SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND DAN H. WHEELER, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, PETITIONERS

VS.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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526396—43——1

United States Circuit Court of Appeals for the Second Circuit

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC., PETITIONER

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND DAN H. WHEELER, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, RESPONDENTS

Petition for review

Filed Oct. 27, 1942

To the Honorable the Judges of the Circuit Court of Appeals for the Second Circuit:

The petition of Associated Industries of New York State, Inc., respectively alleges and shows:

1. This is a proceeding to review parts of an order dated August 28, 1942, made by the respondent Wheeler and an order dated September 30, 1942, made by the respondent Ickes, affirming said order of respondent Wheeler. The proceeding for the review of said orders is pursuant to the provisions of the Bituminous Coal Act of 1937, Act of April 26, 1937, Chap. 127, Sec. 6, 50 Stat. 85 (hereinafter for convenience called the "Act"), 15 U. S. C., Sec. 828 et seq., especially Sec. 836 (b).

[File endorsement omitted.]

2. Petitioner is a membership corporation organized and existing under the laws of the State of New York, having its
2 principal office and place of business at No. 361 Delaware Avenue in the City of Buffalo, Erie County, State of New York, in this Second Circuit. Petitioner's membership consists of 1,356 persons, firms, and corporations, a list of whom is annexed hereto and made a part hereof, all of whom are engaged in commerce or industry, or both, in the State of New York in this Second Circuit. Petitioner's members purchase and consume substantial quantities (estimated to be approximately 15,000,000 tons for the year 1942) of bituminous coal produced in Minimum Price Area 1, as such Area is defined in the Minimum-Price-Area Table set out in Section 4, Part II, subsection (a) of the Act, 15 U. S. C., Section 833 (a), and which is shipped for sale and sold in market areas 2 and 4, as established by the respondents pursuant to the provisions of the Act.

3. Respondent Harold L. Ickes is the Secretary of the Interior and the successor of the National Bituminous Coal Commission established under the Act. Pursuant to the Reorganization Act of 1939, Public Resolution 20, 53 Stat. 561, and the President's

Reorganization Plan No. II thereunder, effective July 1, 1939, 53 Stat. 1433, said Commission was abolished and its functions were transferred to respondent Ickes. At the date of the making of the orders herein sought to be reviewed and during the proceedings hereinafter described which resulted in the making of said orders said respondent Ickes was and now is charged with the duty of administering the Act, but within the limits of the authority conferred by the provisions thereof.

4. Respondent Dan H. Wheeler is the Director of the Bituminous Coal Division of the Department of the Interior, appointed by the respondent Ickes to have charge of the administration of said Division under the supervision and direction of respondent Ickes. Said respondent Wheeler was Acting Director of
3 said Division at the time of the making of the orders sought to be reviewed herein and during the proceedings hereinafter described which resulted in the making of said orders. Said respondent Wheeler was and is charged with the duty of administering the Act under the supervision and direction of said Ickes, but within the limits of the authority conferred by the provisions thereof.

5. Petitioner is aggrieved by an order dated August 28, 1942, made by respondent Wheeler, insofar as the said order purports to increase the minimum prices theretofore in effect for bituminous coal produced in said Minimum Price Area 1 and sold and shipped in said market areas 2 and 4 in the amount of 20¢ per ton, effective 12:01 a. m., October 1, 1942. Petitioner is also aggrieved by the order of respondent Ickes, dated September 30, 1942, which approved the said order of respondent Wheeler. Both of said orders were made as the result of a proceeding before the said Bituminous Coal Division, hereinafter described, to which petitioner was a party.

6. The said proceeding which resulted in the making of the orders to be reviewed herein is entitled "In the Matter of Determining the Extent of Change, if any, in Excess of 2 Cents Per Net Ton in the Weighted Average of the Total Costs of Any of the Minimum Price Areas and of Revising the Effective Minimum Prices as May Be Required by Reason of Any Such Change in Cost." Said proceeding was designated "General Docket No. 21" and the first phase of the hearings in said proceeding was commenced by the issuance and publication by H. A. Gray, then Director of the Bituminous Coal Division and predecessor of respondent Wheeler, of a notice and order dated May 2, 1941, which, among other things, recited the duty of the Division as follows:

"It is the duty of the Division under Section 4 II (a)
4 of the Act to revise the effective minimum prices upon

satisfactory proof that there has been a change in any minimum price area in excess of 2 cents per net ton in the weighted average of the total costs heretofore determined by the Division in General Docket No. 15.

"A preliminary compilation prepared by the Economics Branch of the Division from verified cost reports of individual producers and attached hereto as Exhibit A indicates that there has been a change in excess of 2 cents per net ton in such weighted average of the total costs for one or more of the minimum price areas."

7. The said Exhibit A attached to said notice and order showed that in respect of Minimum Price Area 1 the weighted average of the total costs of producing the ascertainable tonnage of coal produced in said area had decreased in each of the calendar years 1938, 1939, and 1940, as follows: $.0026 per ton in 1938, $.1274 per ton in 1939, and $.1855 per ton in 1940.

8. Said notice and order also directed:

"The matter concerned herewith is for the purpose of (a) determining the extent, if any, to which there has been in any of the various minimum price areas a change in excess of 2 cents per net ton in the weighted average of the total costs heretofore determined by the Division in General Docket No. 15, and (b) making such revision of the effective minimum prices as may be required by reason of any such change in costs."

9. The decreases in said costs, as shown in said Exhibit A, were related to the basic determination of weighted average of total costs for said Minimum Price Area 1, $2.1284 per ton, as had previously been determined in a proceeding originally commenced before the Bituminous Coal Commission and concluded by respondent Ickes and designated "General Docket No. 15."

5 10. The said notice and order dated May 2, 1941, further directed:

"Notice of such hearing is hereby given to the Bituminous Coal Producers Board for each district, to all Code members, to the Consumers' Counsel, and to all other persons who may have an interest in this matter. Any person desiring to be heard or to be admitted as a party to such proceeding shall file a notice to that effect with the Bituminous Coal Division on or before May 19, 1941."

11. Petitioner duly filed a notice with the said Division prior to May 19, 1941, and thereby became and continued to be a party to the said proceeding which was designated "General Docket No. 21." In said proceeding petitioner duly objected and excepted to the determinations made in said proceeding and duly objected and excepted to the said orders of August 28 and September 30, 1942, made as a result thereof, and duly excepted and objected to the findings, conclusions, and recommendations, upon

which said orders were made. Petitioner further petitioned respondent Ickes for the review of said determinations and for a stay of the said order of respondent Wheeler dated August 28, 1942, but said petition was dismissed and all of petitioner's exceptions and objections were overruled.

12. In making the said orders, especially the provisions thereof which purport to increase, in the amount of 20¢ per ton, the minimum prices for bituminous coal produced in Minimum Price Area 1 and shipped and sold in market areas 2 and 4, as provided in the said orders dated August 28 and September 30, 1942, respondents Ickes and Wheeler acted beyond any authority conferred upon them, or either of them, by the provisions of the Act or by any other provisions of law. The said orders were made contrary to law and were made on findings which are contrary to the evidence received in the said proceeding designated as General Docket No. 21, as aforesaid, and were made upon findings which are not supported by substantial evi-
6 dence. The provision of the order of respondent Wheeler, dated August 28, 1942, which directs that the minimum price of bituminous coal produced in said Minimum Price Area 1 and shipped and sold in said market areas 2 and 4 be increased by the amount of 20¢ per ton effective October 1, 1942, does not accord with the proof received in said proceeding designated "General Docket No. 21" that the weighted average of the total costs of producing coal in said Minimum Price Area 1 had increased by the amount of 18.76¢ per ton for the year ended December 31, 1940, which is the most recent period for which proof of such costs was received in said proceeding, thus requiring a decrease rather than an increase in the said minimum price.

13. The Act, pursuant to which said proceeding designated General Docket No. 21 purportedly was taken, provides, among other things, for the regulation, sale, and distribution in interstate commerce of bituminous coal by establishing a bituminous coal code of fair competition, by preventing unfair methods of competition in the marketing of coal, and by prescribing minimum and maximum prices and marketing rules and regulations for the sale of coal by producers, members of the bituminous code.

14. As enacted, the Act provided for the establishment of a Commission to administer the Act, composed of seven members appointed by the President by and with the advice and consent of the Senate for a term of four years (15 U. S. C., Section 829). Pursuant to the President's said Reorganization Plan, No. II, effective July 1, 1939, 53 Stat. 561 and 53 Stat. 1433, the Commission was abolished and its functions transferred to the respondent Ickes, Secretary of the Interior. In this petition in

referring to the provisions of the Act reference will be made to the "Commission," but that term now includes respondent Ickes, Secretary of the Interior, and respondent Wheeler, Director of the Bituminous Coal Division of the Department of the Interior.

7 15. The Act further provides that when a minimum price for coal has been fixed by the Commission pursuant to the provisions of the Act, no coal subject to the provisions of Section 4, Part II of the Act, shall be sold or delivered, or offered for sale, at a price below the minimum therefor established by the Commission, and that the sale or offer for sale of coal at a price below such minimum shall constitute a violation of the code [15 U. S. C. Sec. 833 (e)].

16. The Act further provides (15 U. S. C. Sec. 832) for the organization of producers of coal (operators of mines) as members of the bituminous coal code. Said code members are further organized into district boards of code members, to consist of not less than three nor more than seventeen code members.

17. Pursuant to such provision, coal producers operating mines in the area designated as Minimum Price Area 1 have been organized into eight district boards of code members, the territorial boundaries of which are set forth in the Annex to the Act entitled "Schedule of Districts."

18. Under the Act a district board is authorized "from time to time on its own motion or when directed by the Commission, [to] propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonal demand." [Ses. 4, II (a) 15 U. S. C. Sec. 833 (a).]

19. The Act further provides, however, that "in the event a district board shall fail, for any reason, to take action authorized or required by this Act, then the Commission may take such action in lieu of the district board." [Section 6 (a) 15 U. S. C. Sec. 836 (a).]

8 20. As hereinafter alleged, the proceeding which resulted in the making of the orders sought to be reviewed herein were taken by the Commission.

21. The Act further directs that as soon as possible after its creation, each district board shall determine from cost data submitted by the proper statistical bureau of the Commission the "weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936." [Sec. 4, II (a); 15 U. S. C. Sec. 833 (a).]

22. In respect of such determination of the weighted average of total costs for the calendar year 1936, the Act expressly pro-

vides that "the district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1936." [Sec. 4, II (a); 15 U. S. C. 833 (a).]

23. Upon information and belief, that the said provision of the Act for the adjustment of the weighted average of the total costs determined for the year 1936 was included in the Act by reason of the fact that the Act did not become law until April 26, 1937; that it was recognized that the proceedings for the determination of the weighted average of the total costs for the basic year 1936 could not be accomplished until after the close of the calendar year 1936, that under the provisions of the Bituminous Coal Conservation Act of 1935 (ch. 824, 49 Stat. 991)* the Commission had received cost reports from coal
9 producers for the period beginning January 1, 1936 and that use of such data should be made under the 1937 Act.

24. Upon information and belief, the provision of the Act conferring the power to adjust the weighted average cost determined for the calendar year 1936 was strictly limited to the determination of the weighted average cost for said basis year 1936, which said power was exercised by the former Commission, while it continued to exist, and by the respondent Ickes and the then Director of the Bituminous Coal Division, Mr. Gray, in the proceedings for the determination of the weighted average cost for said year 1936, as determined in General Docket No. 15.

25. The Act confers no power upon the respondents to make adjustments in the weighted average of the total costs of producing coal for any calendar year or period subsequent to the basis year 1936 and subsequent to the determinations made in said General Docket No. 15.

26. The Act further provides that the computation of total costs "shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation, and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessment for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration." [Sec. 4, II (a); 15 U. S. C. Sec. 833 (a).]

27. Upon information and belief, the forms of cost reports issued by the Commission to code members for completion and

*That act was held unconstitutional by the Supreme Court in Carter v. Carter Coal Company, 298 U. S. 238.

execution under oath and filing with the Commission with
10 respect to the coal actually produced by such code member in each calendar month of each calendar year beginning with the year 1936 were designed to obtain the actual cost of each such reporting code member (mine) for each such month in respect of each of the several items of cost set out in the aforesaid provisions of Section 4, II (a) of the Act.

28. The Act further provides that the determination of the weighted average of the total costs of the ascertainable tonnage produced in each district in the calendar year 1936, as adjusted, and the computations upon which it was based should be promptly submitted to the Commission by each district board in the respective minimum price area and that the Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum price area, [Sec. 4, II a); 15 U. S. C. Sec. 833 (a).]

29. The Act further provides that said weighted average of the total costs for the calendar year 1936, adjusted pursuant to the express provision of the Act for such adjustment, "shall be taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices." [Sec. 4, II (a); 15 U. S. C. Sec. 833 (a).]

30. Pursuant to the aforesaid provisions of the Act, during the year 1938 the Commission in a proceeding entitled "In the Matter of the Establishment of Minimum Prices and Marketing Rules and Regulations," designated "General Docket No. 15" determined from a tabulation and compilation of the verified cost reports as filed by the code mmbers in the several districts comprising Minimum Price Area 1 that the weighted average of the
11 total costs of producing the ascertainable tonnage of coal produced in said Minimum Price Area 1 for the calendar year 1936, adjusted pursuant to the statutory power to make such adjustment, and to be taken as the basis, was $2.1284 per ton.

31. The said determination of the said basis with respect to said Minimum Price Area 1 was made upon the proof of the cost of actually producing and selling coal by the code members in the several districts comprising said Minimum Price Area 1, as set out in the verified cost reports filed with the Commission by said code members and in supplemental and corrective data furnished the Commission by said code members.

32. Accordingly, said determination thereupon became the basis for the establishment of minimum prices.

33. Upon such basis, the Commission thereafter coordinated and established minimum prices for all of the several kinds, classes

and sizes of coal produced in the several minimum price areas, including Minimum Price Area 1, to be effective beginning October 1, 1940.

34. Upon information and belief, that except as coal has been expressly excepted from the provisions of said minimum prices, all coal produced in Minimum Price Area 1, for the period beginning October 1, 1940 and thereafter, has been and is being sold to petitioner's members at prices not less than said coordinated minimum prices and at prices which are related to said minimum prices; that beginning in the early part of the year 1941, for the most part, said coal has been sold and is now being sold to petitioner's members at prices which are substantially above said minimum prices; that the sales of said coal to petitioner's members have realized to the producers, members of the coal code,
not less than, and in most cases substantially more than,
12 the weighted average of the total costs of producing such coal, as determined by the Commission for Minimum Price Area 1, in said General Docket No. 15.

35. The said Act further provides that after the establishment of minimum prices upon the basis of the determination of the weighted average of the total costs of producing the ascertainable tonnage of coal produced in each minimum price area for the said basis year 1936, adjusted as aforesaid, minimum prices must be increased or decreased to accord with the proof of a change in excess of 2 cents per net ton of 2,000 pounds in the weighted average of the total costs in a particular minimum price area, exclusive of seasonal changes. The express provision of the statute in this respect reads as follows:

"Thereafter [that is, after minimum prices have been established upon the basis of the determination of the weighted average of the total costs for each minimum price area in the calendar year 1936, as adjusted, as expressly authorized by the Act], upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum price area, exclusive of seasonal changes, *the Commission shall increase or decrease the minimum prices accordingly.* The weighted average figures of total cost determined as aforesaid shall be available to the public." [Sec. 4, II (a); 15 U. S. C. Sec. 833 (a).] [Italics supplied.]

36. Upon information and belief, that beginning in the year 1936, for each calendar month in each of the calendar years 1936, 1937, 1938, 1939, 1940, 1941, and 1942 to date, pursuant to the regulations, rulings and orders of the Commission, the code members, producers of coal in the several districts comprising Minimum Price Area 1, have executed and filed with the Coal

Commission verified reports of the actual cost of the reporting producer (mine) in respect of the several items comprising
13 the total costs of actually producing coal, as specified in said Section 4, II (a) of the Act, which said reports have been purportedly verified, checked and corrected by the Commission; that from the cost figures shown upon such filed, verified cost reports, the Commission has made determinations of the weighted average of the total costs of producing the ascertainable tonnage of coal produced in each district, in each minimum price area and in the United States as a whole, not only for the calendar year 1936, adjusted as aforesaid, and as determined in the said proceeding designated "General Docket No. 15," but also for the years 1937, 1938, 1939, and 1940.

37. The said determinations of the weighted average of the total costs in respect of Minimum Price Area 1, as made by the Commission for said years (including the basis determination for the year 1936, as adjusted, as made in said General Docket No. 15, as aforesaid) for producing the total ascertainable tonnage of coal produced in the several districts comprising Minimum Price Area 1, are as follows:

Year:	Weighted average cost per ton
1936 (determined in General Docket No. 15)	$2.1284
1938	2.1258
1939	2.0010
1940	1.9429

The data upon which the foregoing weighted average cost per ton was determined consists of the proof of the statutory items of cost as submitted on verified cost forms as prescribed by the Commission for mines of over fifty tons daily capacity, for mines having rail or river connections regardless of capacity and for mines of under fifty tons capacity.

14 38. Said determination having indicated that there had been a change, that is, a decrease in excess of 2 cents per net ton in the weighted average of the total costs previously determined in said General Docket No. 15, pursuant to the provisions of Section 4 II (a) of the Act, as quoted above, the predecessor of respondent Wheeler, one H. A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, issued and published a notice of and order for a hearing dated May 2, 1941 which, among other things, contained the recitals and the provisions above set forth and directed that a hearing in the matter entitled as aforesaid and designated "General Docket No. 21" be held on May 21, 1941 at the Hearing Room of the Coal Division in Washington before the Honorable Floyd McGowan, an Examiner "for the purpose of (a) determin-

ing the extent, if any, to which there has been in any of the various minimum-price areas a change in excess of 2 cents per net ton in the weighted average of the total costs heretofore determined by the Division in General Docket No. 15, and (b) making such revision of the effective minimum prices as may be required by reason of any such change in costs."

39. The said proceedings instituted by said order were designated, as hereinabove described, as General Docket No. 21. Said order further further directed that at the beginning the hearing would be limited solely to the matter of the extent of change, if any, in the weighted average of the total costs per net ton in the various minimum price areas, as previously determined by the Division in General Docket No. 15, and that at a subsequent time the hearing would be resumed for the purpose of taking evidence "with respect to such revision of the effective minimum prices as may be required by such changes in costs as are established."

40. At the proceedings taken in the first phase of the proceedings directed to be held by the said order dated May 2, 1941, the proof received, which, among other things, consisted of a compilation and tabulation from the completed and checked verified cost reports as filed by coal producers, members of the bituminous coal code, in Minimum Price Area 1, and all changes directed to be made by such members to correct such filed cost reports, showed that the weighted average of the total costs per ton of producing the ascertainable tonnage of coal produced in said Minimum Price Area 1 had changed, that is, had decreased, in excess of 2¢ per ton, to wit, in the amount of 18.76¢ per ton for the year 1940, as compared with the determination of $2.1284 per ton for the basis year 1936, as adjusted, as made in the proceeding designated General Docket 15. Said proof showed that the weighted average of the total costs per ton of producing the ascertainable tonnage of coal produced in said Minimum Price Area 1 for the year 1940 was $1.9408 per ton, or 18.76¢ per ton below the said determination of the weighted average cost of producing the ascertainable tonnage of coal produced in said Minimum Price Area 1 for the basis year 1936 as adjusted and as determined in said General Docket No. 15.

41. Upon such proof of decrease in the weighted average of the total costs of producing the ascertainable tonnage of coal produced in Minimum Price Area 1, as aforesaid, and pursuant to the published order and notice dated May 2, 1941, in order to comply with the mandatory direction contained in Section 4, II (a) of the Act, respondents Ickes and Wheeler should have decreased uniformly the then established minimum prices for

the several kinds, classes and sizes of bituminous coal produced in Minimum Price Area 1 and shipped and sold in said market areas 2 and 4 by the amount of not less than 18.76¢ per ton.

42. However and notwithstanding such proof and the provisions of the said published order and notice,
16 as aforesaid, and notwithstanding the duty of said respondents to decrease said minimum prices, as aforesaid, over the objections and exceptions of petitioner, said respondents by making the said orders dated August 28 and September 30, 1942, hereinabove mentioned, increased said minimum prices in the amount of 20¢ per ton. The said increase purported to be based upon findings, conclusions and recommendations made by the Trial Examiner in the proceedings in said General Docket No. 21 and which, among other things, recommended, without any substantial evidence to support such recommendation, that the said weighted average of the total costs per ton of $1.9408 per ton for the said year 1940, as aforesaid, be adjusted by adding to said determination, without any authority in law and without substantial evidence to support such addition, an amount purporting to reflect an estimate of changes in certain, but not all, of the items of cost allegedly occurring in the year 1941. Said findings, conclusions and recommendations by the said Trial Examiner in the proceeding as aforesaid were made over the objections of petitioner. The said adjustment as so recommended by the Examiner changed and increased the determination of the weighted average of the said costs for the year 1940 from $1.9408 per ton to $2.2503 per ton and thereby increased the weighted average of the total costs for the year 1940 for said Minimum Price Area 1 by the amount of 12.19¢ above the determination of the said weighted average of the total costs for the basis year 1936, as adjusted, or $2.1284, as determined in said General Docket No. 15.

43. The said illegal and improper adjustment of the said weighted average of the total costs for the year 1940, as aforesaid, were approved by the respondent Wheeler and by the respondent Ickes, the said respondent Ickes having issued an order and opinion dated April 13, 1942 approving the action of the respondent Wheeler in this respect.

17 44. Said opinion and order of respondent Ickes approving the said purported adjustment in the said weighted average of the total costs for the said year 1940 was without authority in law, contrary to law and was made upon purported findings, conclusions and recommendations which are not supported by substantial evidence and are contrary to the evidence received in the said first phase of the proceedings in the said General Docket No. 21.

45. On or about April 17, 1942 respondent Wheeler issued an order and notice in the said proceeding designated General Docket 21, directing a resumption of the hearing of the proceedings in said docket for the purpose of determining what revisions should be made in existing minimum prices in order to reflect changes in cost theretofore allegedly found by respondent Wheeler in said proceeding. Said order and notice purported to recite, among other things, that the hearing would be strictly limited to determining what revisions should be made, as aforesaid, and that in the absence of any showing why the minimum prices should be increased or decreased in accordance with the cost changes for each respective minimum price area where the established change was in excess of 2¢ per ton, then increases or decreases in minimum prices, presently effective, be made accordingly.

46. The said order and notice further purported to recite the proceedings in the first phase of said General Docket 21 and that, among other things, it had been determined that for the several districts in Minimum Price Area 1 an increase of 12.19¢ per ton had occurred in the weighted average of the total cost of producing the ascertainable tonnage of coal produced in Minimum Price Area 1 during the year ended December 31, 1940, as compared with the determination of the weighted average of the total
18 costs for said Minimum Price Area No. 1 theretofore determined in General Docket No. 15 and that respondent Ickes as Secretary of the Interior had reviewed such purported determination and affirmed the same.

47. In the resumed second phase of the proceedings in said General Docket 21, the Trial Examiner, over the objection of petitioners, received testimony purporting to show that the code members in the several districts in Minimum Price Area 1 had realized from sales of coal at minimum prices during the period October 1, 1940 to September 30, 1941 an average price of $2.0647 per ton.

48. There was in fact no proof that all of the said coal produced and sold during said period was sold at minimum prices.

49. Upon said purported testimony said Examiner made a finding that the sales of said coal at minimum prices during said period realized an amount which was 18.56¢ per ton below the purported determination of the weighted average of the total cost of producing coal produced in Minimum Price Area 1 for the year ended December 31, 1940, as illegally and improperly adjusted, or $2.2503 per ton. Said purported finding was made without substantial evidence to support it.

50. Said Examiner, at the same time and in the same proceeding made a further purported finding that in respect of the coal

produced in Minimum Price Area 2 during the said period, the alleged deficiency of realizations of sales of coal during said period at minimum prices was 1.56¢ per ton.

51. Said Examiner further made a purported finding by applying a so-called weighted average formula for increasing the minimum price of coal produced in Market Areas 1 and 2 and shipped and sold in Market Areas 1 to 21, inclusive, that during said period the then effective minimum prices for coal shipped and sold in said market areas should be increased by the amount of 18.54¢ per ton.

52. Said Examiner further made a purported finding and recommendation that in order to adjust such increases to the nearest 5¢ unit, the minimum prices for coal shipped and sold in Market Areas 1–21 should be increased by the amount of 20¢ per ton.

53. All of said purported findings and recommendations of the said Examiner were made over the objection and exceptions of petitioner and were without substantial evidence to support them.

54. Thereafter, over the objection and exceptions of petitioner, respondent Wheeler adopted the said purported findings and recommendations of the Trial Examiner in all substantial respects, with minor modifications, and purported to find and conclude, among other things, that the bituminous coal produced in Minimum Price Areas 1 and 2 and shipped and sold in Market Areas 1–21 should be increased by the amount of 20¢ per ton.

55. Said purported findings and conclusions made by respondent Wheeler were made without substantial evidence to support them and are contrary to law and contrary to the proof received in said proceeding designated General Docket No. 21.

56. Petitioner duly objected and excepted to said findings and conclusions.

57. Upon said purported findings and conclusions respondent Wheeler made the said order dated August 28, 1942, to be reviewed herein, which, among other things, directs that effective October 1, 1942, at 12:01 a. m., the schedules of minimum prices (then in effect) for all shipments of coal from the several districts comprising Minimum Price Area 1 shipped for sale and consumption in Market Areas 1–21 (which include market areas 2 and 4) should be increased by the amount of 20¢ per ton.

58. The said order dated August 28, 1942, made by the said respondent Wheeler, as aforesaid, is the result of (a) the said unlawful and improper adjustments made in the determination of the weighted average of the total costs of producing the ascertainable tonnage of coal produced in Minimum Price Area 1 for the year ended December 31, 1940, by increasing such de-

termination from $1.9408 per ton to $2.2503 per ton and (b) the said unlawful and improper addition of the further amount of approximately 7¢ per ton as the alleged deficiency in realization of sales of coal at minimum prices during the said period October 1, 1940 to September 30, 1941, on the assumption that all sales of coal were made at minimum prices. Said additions were made without authority in law, are contrary to the provisions of the Act, were made without substantial evidence to support them and are contrary to the proof received in the proceeding in said General Docket No. 21.

59. Upon a purported review by respondent Ickes of the said order of respondent Wheeler dated August 28, 1942, the said order was affirmed by an order and opinion of said respondent Ickes dated September 30, 1942.

60. The said orders dated August 28 and September 30, 1942, made by the respondents as aforesaid, are prejudicial to petitioner and its members, in that they require petitioner and its members to purchase and pay for bituminous coal produced in Minimum Price Area 1 at increased minimum prices and at prices related to such increased minimum prices which have not been determined according to law. Said orders were made contrary to law,
21 without authority in law, contrary to the provisions of the Act and were made upon purported findings, conclusions and recommendations which are without substantial evidence to support them and contrary to the proof received at the proceedings in said General Docket No. 21.

Wherefore, petitioner prays that the said respondents Ickes and Wheeler be directed to certify and file in this Court a transcript of the record, or so much thereof as may be pertinent, upon which the said orders dated August 28 and September 30, 1942 were made and entered; that this honorable Court review the said orders, particularly the portions thereof which direct that the minimum prices for coal produced in Minimum Price Area 1 and shipped for sale and sold and consumed in Market Areas 2 and 4, be increased by the amount of 20¢ per ton and that upon such review this Court set aside the parts of the said orders as aforesaid, and grant petitioner such other, further and different relief as may be just and proper in the premises.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.,
By (Signed) MARK A. DALY,
Executive Vice President, Petitioner.

LE BOEUF & LAMB,
Attorneys for Petitioner,
15 Broad Street, New York, New York.
HORACE R. LAMB, Esq.,
of Counsel.

22 STATE OF NEW YORK,
County of Monroe, ss:

Mark A. Daly, being duly sworn, deposes and says:

That he is Executive Vice President of Associated Industries of New York State, Inc., the petitioner named in the foregoing petition; that he is familiar with all the proceedings described in said petition; that he has read said petition and knows the contents thereof and that the same is true to the best of deponent's knowledge and belief except as to matters therein stated to be alleged upon information.

(Signed) MARK A. DALY.

Subscribed and sworn to before me this 23rd day of October 1942.

(Signed) BERNICE J. SNYDER,
Notary Public.

23 LIST OF MEMBERS OF PETITIONER ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.

Akron:
- Louisville Cement Co. of N. Y., Inc.

Albany:
- Albany Billiard Ball Company.
- Albany Calcium Light Co.
- Albany Car Wheel Company.
- Albany Garage Company.
- Albany Packing Co., Inc.
- The American Meter Company.
- A.P.W. Paper Company.
- Barber & Bennett, Inc.
- William Barnet & Son.
- Clausen Iron Co., Inc.
- Consolidated Car-Heating Co.
- The Embossing Company.
- Fitch Advertising Co.
- C. O. Hasselbarth, Inc.
- Killip Laundering Company.
- Lone Star Cement Co. of N. Y., Inc.
- James McKinney & Son.
- Mohawk Brush Company.

Albany—Continued.
- National Casket Company.
- New York Power & Light Corp.
- North American Cement Corp.
- B. Payn's Sons Tobacco Company.
- Geo. Spalt & Sons, Inc.
- Waterville Laundry, Inc.
- Wilke Laundry Co., Inc.
- Williams Press, Inc.

Alsen:
- Lehigh Portland Cement Co.

Amsterdam:
- Bigelow-Sanford Carpet Co., Inc.
- Grieme Lumber & Supply Co.
- Smeallie & Voorhees.

Antwerp:
- Baumert & Co., Inc., F. X.

Atlanta:
- Boggs Manufacturing Corp.

Auburn:
- Auburn Button Works, Inc.
- Auburn Spark Plug Co., Inc.
- Columbian Rope Company.

Auburn—Continued.
Dun & McCarthy.
Enterprise Foundry Co.
H. C. Hemingway & Company.
Henry & Allen, Inc.
International Harvester Co., Inc.
Marshall, Meadows & Stewart, Inc.
C. G. Meaker Co., Inc.
Shoe Form Co., Inc.
Averill Park:
Faith Mills, Inc.
Baldwinsville:
Morris Machine Works.
Ballston, Spa:
Ackshand Knitting Co., Inc.
American Hide & Leather Co., Inc.
Batavia:
Batavia Poster Advertising Co.
Climax Corporation.
Doehler Die Casting Corp.
Genesee Stone Products Corp.
F. E. Mason & Sons.
Massey-Harris Co., Inc., The.
P. W. Minor & Son, Inc.
E. N. Rowell Company.
Wiard Plow Company.
24 Bath:
Babcock Co., The W. W.
Beacon:
Dutchess Tool Company.
Green Fuel Economizer Co., The.
Berlin:
W. J. Cowee, Inc.
Binghamton:
Agfa Ansco Division, General Aniline & Film Corporation.
Bates-Troy Laundry Co., Inc.

Binghamton—Continued.
Binghamton Foundry & Machine Company.
Clover Dale Farms Co., Inc.
H. C. Collier & Sons, Inc.
Cream Dove Mfg., Inc.
Crowley's Milk Co., Inc.
Cutler Ice Company.
Davis & Sweeney Laundry.
Fowler, Dick & Walker.
Kroehler Mfg. Co., Inc.
Mitchell & Church Company.
A. Roberson & Son.
Spaulding Bakeries, Inc.
E. H. Titchener & Co.
Vail-Ballou Press, Inc.
Blasdell:
The Exolon Company.
Bowmansville:
Bowmansville Creamery, Inc.
Brocton:
Brocton Furniture Company.
Buffalo:
Acme Shale Brick Company.
Acme Steel & Malleable Iron Works.
Adam, Meldrum & Anderson Company.
Amcoin Corporation.
American Elevator & Grain Co., Inc.
The American Ferment Company.
American Palace Steam Laundry.
Andrews, W. D. & C. N.
Arner Co., Inc., The.
Atlas Steel Casting Co.
Baker, Jones, Hausauer, Inc.
Barcalo Manufacturing Co.
Barmon Brothers Company, Inc.
Beals, McCarthy & Rogers.
Bell Aircraft Corporation.
Bensler Press Company.
L. L. Berger, Inc.

Buffalo—Continued.
Bergman Tool Mfg. Company.
Berrick, Estate of Charles.
Birge Co., Inc., The.
Bison Lumber Company.
The Black Rock Milling Corp.
Bliss & Laughlin, Inc.
Buerk Tool Works.
Buffalo Cold Storage Company.
Buffalo Corrugated Container Co.
Buffalo Crushed Stone Company.
Buffalo Electric Co., Inc.
Buffalo Electro Chemical Co., Inc.
Buffalo Envelope Company.
Buffalo Fire Aplliance Corp.
Buffalo Forge Company.
Buffalo Foundry & Machine Co.
Buffalo Garment Co., Inc.
Buffalo General Electric Co.
Buffalo General Laundries Corp.
Buffalo Housewrecking & Salvage Company.
Buffalo Jewelry Case Co., Inc.
Buffalo Lamp Works.
Buffalo Live Stock Exchange, Inc.
Buffalo Marine Mart.
25 Buffalo, Niagara Electric Corp.
Buffalo Plate & Window Glass Corp.
Buffalo Pottery.
Buffalo Scale Company.
Buffalo Tank Corp.
Buffalo Wire Works Company.

Buffalo—Continued.
Burt Co., Inc., F. N.
Central Dry Cleaning Company.
Chevrolet-Buffalo Div., General Motors Corp.
Clement Co., J. W.
Cling-Surface Company.
Colonial Radio Corp.
Consolidated Packaging Machinery Company.
Continental-Wonder Baking Corp.
Coverall Service & Supply, Inc.
Cowper Co., Inc., The John W.
Crosby Company, The.
Curtiss Aeroplane Div., Curtiss-Wright Corp.
Curtis Screw Co., Inc.
Del-Tup Corporation.
Dennis & Co., Inc.
Denton, Cottier & Daniels, Inc.
Dodds Alderney Dairy, Inc.
Donaldson, O. G. & D. H.
Donner-Hanna Coke Corp,
Duffy Silk Company.
Eastman Machine Company.
The Emerick Candy Co., Inc.
Fairmont Creamery Co., The.
Farrel-Birmingham Co., Inc.
Fedders Mfg. Co., Inc.
Federal Crushed Stone Corp.
Federal Portland Cement Co., Inc.
August Feine & Sons Company.
Fetter Steel Barrel Corp.
The Fleischmann Malting Co.
Flickinger Co., Inc., S. M.
Foster-Milburn Company.
Gardiner Mfg. Co., Inc.

Buffalo—Continued.
General Drop Forge, Div. of Brown-Lipe Gear Company.
Gibson Co., Inc., A. C.
Gibson & Doty.
Glenn Confections, Inc.
Globe Plaster Company.
Globe Woven Belting Co., Inc.
Greater Buffalo Associated Meat Industry.
Goode Cake Shop, Inc., The.
Gronachan Envelope & Tag Co.
Guenther Printing Co., Inc., J. M.
Hager & Sons Co., E. M.
Hall Baking Company.
Hanna Furnace Corp., The.
Hard Manufacturing Company.
Harvey's Sunshine Laundry.
Hecker H-O Division, Hecker Products Corp.
Heinz & Munschauer.
Henrich's Sons Co., Wm.
Hewitt Rubber Corporation.
Hinde & Dauch Paper Company.
Holling Press, Inc., The.
Holmes Machinery Co., E & B.
Houde Engineering Corporation.
House & Sons, Jacob.
Howard Brothers Chemical Co.
International Milling Company.
Inving Air Chute Co., Inc.
Jahraus-Braun Company.
Jeffrey-Fell Company.
Jewell Alloy & Malleable Co.
Keller, Inc., Wm. J.

Buffalo—Continued.
Kelley Island Lime & Transport Co., The.
Kellogg & Sons, Inc., Spencer.
Kintho Mfg. Co., Inc.
Kittinger Company, Inc.
Kleinhans Company, The.
26 Laub's Sons, George.
Lehigh Portland Cement Corp.
Leous Furriers, Inc.
Mary Lincoln Candies, Inc.
Lucidol Corporation.
Lyons Co., Inc., William H.
M & T Trust Company.
Manzel Brothers Company.
Markel Electric Products, Inc.
Master Metal Products, Inc.
McCauley Metal Products, Inc.
Mentholatum Co., The.
Mercer Printing Company.
Merchants Toilet Supply Co.
Merckens Chocolate Co., Inc.
Metals & Alloy Specialties Co., Inc.
Mohn & Hunter Laundry.
Molin Corp., The.
Mollenberg-Betz Machine Co.
Mu-Col Company, The.
Mugler & Co., Inc., Charles P.
National Gypsum Company.
Neal Co., Inc., R. C.
Niagara Blower Company.
Niagara Falls Smelting & Refining Corp.
Niagara Frontier Food Terminal, Inc.
Niagara Lithograph Company.
Niagara, Lockport and Ontario Power Company.

Buffalo—Continued.
Niagara Machine & Tool Works.
The Office Towel Supply Co.
Othine Laboratories.
Otis Elevator Company.
Phoenix Die Casting Company.
Pierce & Stevens, Inc.
Pierce's Proprietaries, Inc.
Pillsbury Flour Mills Company.
Plastergon Wall Board Company.
Pohlman Foundry Co., Inc.
Pratt & Lambert, Inc.
Pratt & Letchworth Company.
Quality Damp Wash Laundry Co.
Queen City Photo Engraving Co., Inc.
Rauch & Stoeckl Printing Co., Inc.
Remington Rand, Inc.
Republic Steel Corp.
Rice & Adams Corp.
Roberts-Gordon Appliance Corp.
Root, Neal & Company.
Ross Heater & Mfg. Co., Inc.
Rugby Knitting Mills, Inc.
Russell-Miller Milling Co.
Ryerson & Son, Inc., Joseph T.
Schreiber Brewing Co., Inc.
Sharpe, Inc.
Shirton's Willsey Laundry.
Smith Victory Corporation.
Sowers Manufacturing Co.
Spencer Lens Company.
Standard Buffalo Foundry, Inc.
Strong Steel Foundry Company.
Sweet Kleen Laundry, Inc.

Buffalo—Continued.
Terminals & Transportation Corp.
Thoma Paper Box Co., Inc.
Transfer Elevator Corp.
Trico Products Corp.
United States Gypsum Company.
Urban Milling Company, George.
Ushco Mfg. Company, Inc.
U. S. Rubber Reclaiming Co., Inc.
Victor & Company, A.
Washburn-Crosby Company.
Washington Iron Works, Inc.
Wesselmann, Inc., L. E.
Western Shade Cloth Co., of N. Y., The.
Whissel Lumber Co., Inc., L. N.
Whitbeck's Central Star Laundry.
27 Whitmer-Jackson Co., Inc., The.
Whitmier & Ferris Company.
Whitney-Graham Co., Inc., The.
Wildroot Company, Inc.
Wile & Company, Inc., M.
Williams & Co., J. H.
Williams Gold Refining Co., The.
Wilson, Charles R.
Wilson, K. R.
Winch Company, Frank.
Wise, Everett S. & Alvin W.
Zeller's Sons, G. F.

Canajoharie:
Beech-Nut Packing Co.

Canandaigua:
Lisk Mfg. Co., Ltd., The.
Roper Knitting Co., Inc.

Carthage:
Carthage Paper Makers, Inc.
National Paper Products Co.

Carthage—Continued.
Taggart Corporation.
Castleton-on-Hudson:
Fort Orange Paper Company.
Castorland:
Climax Manufacturing Company.
Oakes & Burger Company.
Setter Brothers, Inc.
Cayuga:
Beacon Milling Co., Inc., The.
Cementon:
Alpha Portland Cement Co.
Chadwicks:
Standard Silk Company, The
Chaffee:
United Block Co., Inc.
Clark Mills:
Hind & Harrison Plush Co., The.
Clayton:
Frink, Carl H.
Clayville:
Clayville Knitting Company.
Clyde:
Clyde Products Corporation.
Cobleskill:
Borst & Burhans Company.
Harder Refrigerator Company.
Sonn Poster Advertising Co.
Cohocton:
Larrowe Buckwheat Flour Corp.
Wilcox Poster Advertising Co.
Cohoes:
Arnold Knitwear Corp.
Lowenthal & Co., Inc., W.
Mohawk Laundry.
Peerless Fibre Company.
Putnam Knitting Company.
Star Woolen Company.
Corning:
Corning Fibre Box Corp.
Corning Glass Works.
Cortland:
Champion Sheet Metal Co., Inc.
Cooper Brothers, Inc.
Crescent Corset Company.
Dillon Poster Advertiser, L. M.
Wickwire Brothers.
Cuba:
Phelps & Sibley Company.
Dansville:
Berwin Paper Corporation.
Owen Publishing Co., F. A.
28 Depew:
Gould Storage Battery Corp.
Dolgeville:
Breckwoldt & Son, Inc., Julius.
Green Company, Daniel.
Dunkirk:
Dunkirk Laundry Company.
Dunkirk Printing Company.
Dunkirk Radiator Corp.
East Aurora:
Griggs & Ball Company, The.
Dillon Poster Advertiser, S. E.
Elmira:
American LaFrance Foamite Corp.
Chemung Foundry Corp.
Custard & Kistler Laundry, Inc.
Elmira Foundry Co., Inc.
Empire Produce Company.
Hardinge Brothers, Inc.
Howell & Co., F. M.
Hygeia Refrigerating Company.

Elmira—Continued.
Kennedy Valve Mfg. Co., The.
LeValley, McLeod, Kinkaid Co., Inc.
Perfect Service Laundry.
Shelt Co., Inc., The.
Thacher Mfg. Company.
Elmira Heights:
Eclipse Machine Division, Bendix Aviation Corporation.
Endicott:
Endicott Forging & Mfg. Co., Inc.
Endicott Johnson Corporation.
International Time Recording Co. of New York.
Tabulating Machine Co., The.
Falconer:
American Mfg. Concern.
Fayetteville:
McIntyre Bros. Paper Co., Inc.
Fonda:
Fonda Glove Lining Company.
Frankfort:
Union Fork & Hoe Co., The.
Franklinville:
Ontario Knife Company.
Fredonia:
Fredonia Seed Co., Inc.
Frewsburg:
Frewsburg Furniture Company.
Fulton:
Armstrong Cork Company.
Dilts Machine Works, Inc.
Foster Bros. & Chatillon Co.
Hunter Arms Co., Inc., The.
McHenry-Millhouse Mfg. Co.
North End Paper Company.
Oswego Falls Corp.
Fulton—Continued.
Peter Cailler Kohler Swiss Choc. Co., Inc.
Sealright Co., Inc.
Victoria Paper Mills Co., The.
Fultonville:
White Mop Wringer Company.
Gasport:
"Friend" Manufacturing Co.
Geneva:
Andes Range & Furnace Corp.
Geneva Boiler Works, Inc.
Geneva Foundry Corporation.
Geneva Preserving Company.
Hulse Manufacturing Company.
Humphrey Press, The.
Patent Cereals Co., The.
Shur-on Optical Co., Inc.
29 Glen Cove:
Columbia Ribbon & Carbon Mfg. Co., Inc.
Glens Falls:
Imperial Paper & Color Corp.
McMullen-Leavens Company.
Veldown Company.
Bleyl Co., Inc., J. C.
Fulton County Poster Adv. Co., Inc.
Gloversville Knitting Co.
Gloversville Leather Mfg. Corp.
Levor & Co., Inc., G.
Liberty Dressing Co., Inc.
Parkhurst & Co., Inc., E. S.
Robinson, J. G. & T.
Robinson & Smith.
Wood & Hyde Company.
Loomis Talc Corporation, W. H.

Glens Falls—Continued.
St. Lawrence Poster Advertising Co.
Gowanda:
Peter Cooper Corporation.
Eastern Tanners Glue Company.
Granville:
The Telescope Folding Furniture Co., Inc.
Green Island (see Troy).
Greenwich:
Linen Thread Co., Inc., The.
Hammondsport:
Taylor Wine Company, The.
Hancock:
Kerry Co., Inc., Thomas.
Harrisville:
Harrisville Paper Corp.
Hastings on Hudson:
American Brass Company, The.
Herkimer:
Donlon Thomas.
Herkimer Fibre Company.
Quackenbush, Inc., H. M.
Standard Furniture Company.
Hillburn:
Ramapo Ajax Corporation.
Homer:
Newton Line Company, Inc.
Hoosick Falls:
Specialty Insulation Mfg. Co.
Wood Flong Corporation.
Hornell:
DeWitt-Boag Company.
Horseheads:
Weller Hardware & Foundry Co.
Winchester Optical Company.
Hudson:
Hudson Advertising Company.
Hudson—Continued.
Textile By-Products Corp.
Universal Atlas Cement Company.
V & O Press Company, The.
Ilion:
Remington Cash Register Co., Inc.
Sterling Mills.
Irvington:
Lord & Burnham Company.
Ithaca:
Ithaca Gun Company.
Morse Chain Company.
Pritchard & Son, J. G.
Pritchard, Wm. T.
30 Jamestown:
Alliance Furniture Company.
Art Metal Construction Co.
Automatic Voting Machine Corp.
Blackstone Mfg. Company.
Chautauqua Ply Wood Corp.
Clarke Box & Label Works, T. James.
Crawford Furniture Mfg. Corp.
Crescent Tool Company.
Curtis Machine Corporation.
Dahlstrom Metallic Door Co.
Davis-Randolph Furniture Corp.
Elite Furniture Company.
Ellison Bronze Co., Inc.
Grandin Milling Co., D. H.
Hope's Windows, Inc.
Ideal Peerless Laundry Co., Inc.
Jamestown Finishing Prods., Inc.
Jamestown Industries, Inc.
Jamestown Lounge Company.
Jamestown Malleable Iron Corp.

Ithaca—Continued.
Jamestown Metal Corp.
Jamestown Metal Equipment Co., Inc.
Jamestown Royal Upholstery Corp.
Jamestown Steel Partitions, Inc.
Jamestown Sterling Corp.
Jamestown Table Company.
Jamestown Veneer & Plywood Corp.
Lundell-Eckberg Mfg. Co., Inc.
Maddox Table Company.
Marlin-Rockwell Corp.
Monitor Furniture Co., Inc.
Pearl City Plywood Co., Inc.
Shearman Brothers Company.
Union-National, Inc.
Van Stee Corporation.
Weber-Knapp Corp.
Warren Construction Company.
Johnstown:
Gates-Mills, Inc.
H & P Glove Co., Inc.
Ireland Brothers.
Charles King Company.
Charles B. Knox Gelatine Co., Inc.
Milligan & Higgins Corp.
Streeter Hackney & Company.
Kenmore:
Dates Laundry Service, Inc.
Kingston:
Hercules Powder Company.
Alva S. Staples.
Terry Brothers Co., The.
U. S. Lace Curtain Mills.
Universal Road Machinery Co.
Van Slyke & Horton, G. W.
Lackawanna:
Bethlehem Steel Company.
Electro Refractories & Alloys Corp.
Lancaster:
Lancaster Machine Knife Works, Inc.
Le Roy:
Associated Seed Growers, Inc.
Jell-O Division, General Foods Corporation.
Lapp Insulator Co., Inc.
Le Roy Lime & Crushed Stone Corp.
Le Roy Plow Company.
Rib Stone Concrete Company.
Union Steel Chest Corp.
Wells & Co., Inc., S. C.
Little Falls:
Burrows Paper Corporation.
Cherry-Burrell Corp.
31 Gilbert Knitting Company.
Little & Sons, Andrew.
Little Falls Felt Shoe Co.
Little Falls Mfg. Co.
Mohawk Valley Paper Co., Inc.
Little Valley:
Cattaraugus Cutlery Company.
Lockport:
Corson Mfg. Company.
Cowles Detergent Company.
Federal Mill, Inc.
Ferree Company, E. H.
Harrison Radiator Div., General Motors Corp.
Lerch Cold Storage, Inc.
Lockport Cotton Batting Co.
Merritt Engineering & Sales Co., Inc.
Niagara Textile Company.

Lockport—Continued.
Norton Laboratories, Inc.
Roberts Mfg. Co., F. W.
Standard Silicate Co., The.
Upson Company, The.
Western Block Company.
Whitmore Company, C. B.
Ludlowville:
International Salt Company.
Mamaroneck:
Happiness Laundry.
Mamaroneck Individual Laundry.
Pure Food Factory "Hansa."
Manlius:
S. Cheney & Son.
Mayville:
Chautauqua Cabinet Company.
McGraw:
Central Paper Box Company.
Vesta Corset Co., Inc.
Medina:
Bignall Company, The.
Cook & Company, S. A.
Heinz Company, H. J.
Newell & Co., Inc., Robert H.
Swett Iron Works, A. L.
Middleport:
Bewley Brothers Canning Co., Inc.
Middletown:
Clemson Brothers, Inc.
Midport Company, The.
Tompkins Dry Goods Company.
Victor Saw Works, Inc.
Mohawk:
Duofold, Inc.
Monroe:
Monroe Laundry.
Montour Falls:
Shepard Niles Crane & Hoist Corp.
Mount Vernon:
Mt. Vernon Advertising Service.
North American Dye Corporation.
Sanford Laundry.
Willson & Adams Company.
Myers:
Cayuga Rock Salt Co., Inc.
Naples:
Widmer's Wine Cellars, Inc.
Newark:
Bloomer Brothers Company.
Comstock Canning Corp.
Edgett-Burnham Company.
Hallagan Mfg. Company.
Perfection Canning Co., Inc.
Stott's Launderers & Dry Cleaners.
Stuart & Co., Inc., C. T.
82 Newburgh:
American Bobbiner Company.
Coldwell Lawn Mower Company.
Little Falls Paper Co., Inc., The.
Newburgh Beacon News, The.
Newburg Laundry Service, Inc.
Ramsdell Estate, The.
Stern, Frederick.
Williams Bakery, The.
Newfane:
Lockport Felt Company.
New Rochelle:
New Rochelle Individual Laundry.
New York City:
(Greater New York.)
Brooklyn:
American Manufacturing Co.
American Star Cork Co., Inc.

Brooklyn—Continued.
Atlantic Service Co., Inc.
Benisch Brothers.
Bliss Company, E. W.
Brass Goods Mfg. Company.
Bright Light Reflector Co., Inc.
Brooklyn Union Gas Co., The.
Brush, Jr., & Bro., Inc., G.P.
Burton-Dixie Corp.
Comey Brooklyn Co., Inc., R. H.
Commonwealth Color & Chemical Co.
Debevoise Co., The.
Decorated Metal Mfg. Co.
Ebinger Baking Company.
Eberhard Faber Pencil Company.
Far Eastern Mfg. Co., Inc.
Garrett & Company, Inc.
Andrew Geller Shoe Mfg. Co., Inc.
Gleason-Tiebout Glass Company.
Hilo Varnish Corporation.
Kay Manufacturing Corp.
Keystone Varnish Company.
Koppers Co., Inc.
Krodel Reubel Co., Inc., The.
Larsen Baking Company.
Meyer Brothers, Jos. H.
National Licorice Company.
National Meter Company.
Oxford Filing Supply Company.
Paper Novelty Mfg. Company.
Parker, Stearns & Company.
Peelle Company, Inc., The.
Pilgrim Laundry, Inc., The.
Slattery & Bro., Inc., J. B.
Sperry Gyroscope Co., Inc.
Steel & Tubes, Inc.

Brooklyn—Continued.
Strohbeck, Inc., Charles W.
Bronx:
Columbia Metal Box Co.
Electro-Chemical Engraving Co.
Fox Co., Inc., M. Ewing.
Froehlich Cabinet Works, Jacob.
Haiss Mfg. Co., Inc., George.
Orange Blossom Laundry Co.
Williams, J. & J. W.
Winter & Company.
Manhattan:
American Brake Shoe & Foundry Co., The.
American Brass Co., The.
American Can Company.
American Car & Foundry Co.
American-Cyanamid Co.
American Hard Rubber Company.
American Radiator Co. & Standard Sanitary Corporation.
Anaconda Copper Mining Co.
Armour & Company.
Austenal Laboratories, Inc.
Baxter, Kelly & Faust, Inc.
Bendiner & Schlesinger.
33 Best Foods, Inc., The.
Bishop Gutta-Percha Company.
Borden Company, The.
Brown Co., The C. H.
Buckingham Corp., The.
Buffalo Brake Beam Company.
Canada Dry Ginger Ale, Inc.
Casein Mfg. Co. of America, Inc., The.
Chase Bag Company.
Church & Dwight Company.
Columbia Mills, Inc., The.

Manhattan—Continued.
Consolidated Edison Co. of N. Y., Inc.
Consolidated Laundries, Corp.
Continental Baking Co., Inc.
Continental Can Co., Inc.
Crowell-Collier Publishing Co., The.
Defiance Button Machine Co.
DeLaval Separator Co., The.
Detex Watchclock Corp.
Dexter Folder Company.
Eugene Dietzgen Company.
Dorfman & Co., A., Inc.
Dry Milk Co., The.
Duffy-Mott Co., Inc.
duPont deNemours & Co., Inc., E. I.
Electro Bleaching Gas Company.
Ever Ready Label Corp.
Fairbanks Company, The.
Firth Carpet Co., The.
Fitzgibbons Boiler Co., Inc.
Flintkote Company, The.
General Aniline Works, Inc.
General Baking Company.
General Dyestuff Corporation.
Grant Co., W. T.
Hall & Sons, Frank A.
Hawley & Hoops.
Hecker Products Corporation.
Henry Heide, Inc.
Hornthal & Co., Inc.
Hudnut, Richard.
Huguet Silk Corporation.
Interchemical Corporation.
International Business Machines Corporation.
International Paper Company.
International Scale Company.

Manhattan—Continued.
Jonas & Naumburg Corporation.
Julliard & Co., Inc., A. D.
Kohnstamm & Co., Inc., H.
Levey Co., Inc., Frederick H.
Lily-Tulip Cup Corporation.
Lorentzen Hardware Mfg. Corp.
Lorentzen, H. K.
MacFadden Publications, Inc.
McCabe Hanger Mfg. Co., The.
Mica Insulator Company.
Mohawk Milk Products Co., Inc.
Monsanto Chemical Works.
Enoch Morgan's Sons Company.
National Analine Division, Allied Chemical & Dye Corp.
National Biscuit Company.
National Process Co., The.
Neptune Meter Company.
New York & Pennsylvania Co.
New York Air Brake Co., The.
N. Y. Linen Supply & Laundry Co., Inc.
Ohio Chemical & Mfg. Co., The.
Otis Elevator Company.
Parmelee System, Inc.
Patterson-Sargent Company.
Pennsylvania-Dixie Cement Corp.
Pfizer & Company, Charles.
Red Hand Compositions Co., Inc.
Reids Union Dairy, Inc.
Remington Arms Company, Inc.
Robinson Tag & Label Company.

Manhattan—Continued.
St. Joseph Lead Company.
St. Joseph Lead Company.
34 pany.
St. Regis Paper Company.
Sapolin Co., Inc.
Schanz, Inc.
Schwartz & Forger.
Schering & Glatz, Inc.
Sears, Roebuck & Company.
Shell Oil Co., Inc.
Philip Sievering, Inc.
Smithe Machine Co., Inc., F. L.
Stafford, Inc., S. S.
Standard Brands, Inc.
Stanley Co., Inc., John T.
Stauffer Chemical Company.
Steinway & Sons.
Swift & Company, Inc.
Tabulating Machine Co., The.
Texas Company, The.
Thompson & Co., James.
Twyeffort, Inc.
Unexcelled Mfg. Company, Inc.
United States Leather Co., The.
Universal Atlas Cement Company.
Waldorf System, Inc.
Wallach Laundry System.
Warner & Co., Inc., Wm. R.
West Virginia Pulp & Paper Co.
Wetzel, Inc.
Whittaker Clark & Daniels.
Worthington Pump and Machinery Corp.
Wm. Wrigley Jr., Company.
Richard Young Company.
Queens (Long Island):
College Point:
Edo Aircraft Corporation.
Queens—Continued.
Flushing:
McElroy Brothers Poster Adv. Co.
Garden City:
Country Life Press Corporation.
Jamaica:
Gertz, Inc., B.
Krug Baking Co., George A.
Park Laundry Co., of L. I., Inc.
Tilo Roofing Company, Inc.
Long Island City:
American Chicle Company.
American Seal-Kap Corp.
Brett Lithographing Company.
Careful Carpet Cleaning Co., Inc.
Ford Instrument Company, Inc.
Gould-Mersereau Co., Inc., The.
Loose-Wiles Biscuit Company.
Muller Paper Goods Co., Inc.
Thomas, Inc., S. B.
West Disinfecting Company.
Willey Company, C. A.
Maspeth:
The Sterling Casket Hardware Co.
Ozone Park:
Columbia Waxed Products Co.
Dairy Sealed, Inc.
Richmond (Staten Island):
Mariners Harbor:
Brewer Dry Dock Company.
New Brighton:
Muralo Co., The.

Richmond—Continued.
Port Ivory:
Proctor & Gamble Mfg. Co., The.
Prince Bay:
White Dental Mfg. Co., The S. S.
West New Brighton:
Morey-La Rue Laundry.
Stapleton Service Laundry, Inc.
New York Mills:
New York Mills Corporation.
35 Niagara Falls:
Alox Corporation.
American Sales Book Co., Inc.
Carborundum Company, The.
Chisholm-Ryder Co., Inc.
Dobbie Foundry & Machine Co.
Elderfield Hartshorn Hardware Co.
General Abrasive Co., Inc.
Gilman Fanfold Corp., Ltd.
Hooker Electrochemical Co.
Innis Speiden & Co.,
International Cooperage Co., Inc.
Mathieson Alkali Works, Inc., The.
International Graphite & Electrode Corporation.
Kimberly-Clark Corporation.
Niacet Chemicals Corp.
Niagara Alkali Company.
Niagara Poster Advertising Co.
Niagara Searchlight Co., Inc.
Niagara Smelting Corp.
Oldbury Electro Chemical Co.
Palace Laundry Company.
Ramapo Ajax Corporation.
Richmond—Continued.
Titanium Alloy Mfg. Company.
North Tarrytown:
Chevrolet Tarrytown Division of General Motors Corporation.
Eastern Aircraft Division of General Motors Corporation.
North Tonawanda:
American District Steam Co.
Crane Company.
Durez Plastics & Chemicals Co., Inc.
Jones Lumber Co., The R. T.
Metzloff Brothers.
Spillman Engineering Corp.
Tonawanda Corrugated Box Co.
Tonawanda Power Company.
Norwich:
Craine, Inc.
Ireland Machine & Foundry Co., Inc.
Norwich Pharmacal Co., The.
Norwich Wire Works, Inc.
Oakfield:
Haxton Canning Co., Inc.
United States Gypsum Company.
Ogdensburg:
Algonquin Paper Corporation.
Northern New York Poster Service.
Olean:
Carley Heater Co., Inc.
Clark Brothers Company.
Daystrom Corporation.
Ewing Company, A. E.
Olean Glass Co., Inc.
Olean Tile Company.
Utter & Son, W. H.
Oneida:
Smith-Lee Company, Inc.

Oneonta:
Oneonta Outdoor Adv. Company.
Orangeburg:
The Fibre Conduit Company.
Orchard Park:
Acme Veneer Packing Co., Inc.
Oriskany:
Waterbury & Sons Co., H.
Oswego:
Lastlong Underwear Company.
Oswego Board Company.
Oswego Candy Works.
Wallace Poster Advertising Co.
36 Oxford:
Bartlett's Poster Service.
Palmyra:
Drake & Sons, H. R.
Garlock Packing Co., The.
Peekskill:
Fleischmann Distilling Corp.
Peekskill City Laundry.
Penn Yan:
Birkett Mills, The.
Fox & Sons, Inc., W. H.
Guile & Windnagle.
Hollowell & Wise Co., The.
Penn Yan Buses, Inc.
Taylor Chemical Corporation.
Perry:
Perry Knitting Company.
Phelps:
Empire State Picking Company.
Pittsford:
Fordman & Sons, L. C.
Plattsburgh:
Plattsburgh Wall Paper Co.
Underwood Paper Mills, Inc.
Pleasantville:
Ideal Laundry.
Port Chester:
Joyce American Laundry.
Port Jervis:
Gillinder Brothers.
Portville:
Utility Ice Cream Corporation.
Potsdam:
Potsdam Feed & Coal Co., Inc.
Racquette River Paper Co., The.
Poughkeepsie:
Federal Bearings Co., Inc., The.
Hart & Co., Inc., Frederick.
Lane & Brothers, W. T.
Poughkeepsie Adv. Company.
Lumo Woodworking Co., Inc.
Schatz Mfg. Co., The.
Smith Brothers, Inc.
Standard Gage Co., Inc.
Travis Baking Co., Inc.
Central Hudson Gas & Electric Co.
Red Hook:
Red Hook Cold Storage Co., Inc.
Retsof:
Retsof Mining Company.
Rochester:
Addison Lithographing Company.
Alderman Paper Box Company.
American Laundry Machinery Co.
Archer Mfg. Co., Inc.
Bastian Brothers Co.
Bausch & Lomb Optical Co.
Brighton Place Dairy Company.

Rochester—Continued.
Case-Hoyt Corporation.
Wilmot Castle Company.
Clapp, Inc., Harold H.
Clark Company, W. H.
Clark Stek-O Corp.
Aeolian American Corp.
Lawless Brothers Paper Mills.
Clinton Optical Company.
Coon Company, W. B.
Crescent-Puritan Laundry, Inc.
Cross Bros. Co., Inc.
Curtics Brothers Company.
Davenport Machine Tool Co. Inc.
Defender Photo Supply Co., Inc.
Delco Appliance Div., General Motors Corporation.
37 Doyle, Michael.
Eastman Kodak Company.
Elbs, Inc., John G.
Electromatic Typewriters, Inc.
Electro Surgical Instrument Co.
Fanny Farmer Candy Shops, Inc.
Fashion Park, Inc.
Flower City Charcoal Company.
Folmer Graflex Corp., The.
Genesee Electrotype Company.
Gleason Board Company.
Gleason Works.
Haloid Company, The.
Hayner Company, Norman C.
Hetzler Foundries, Inc.
Hickok Mfg. Co., Inc.
Hopeman Lumber & Mfg. Co., Inc.

Rochester—Continued.
Huther Bros. Saw Mfg. Company.
Kee Lox Mfg. Company.
Kirstein Optical Co., Inc.
Lawyer's Co-operative Pub. Co., The.
Leary's Cleaners & Dyers, Inc.
Lorscheider-Schang Co., Inc.
Metal Arts Co., Inc., The.
Moore Corp., John C.
Morgan Machine Co., Inc.
Outdoor Advertising Assn. of N. Y.
Paragon-Revolute Corp.
Parry Machine Co., Inc., Samuel R.
Pfaudler Co., The.
Progressive Foundry Works, Inc.
Pullman Manufacturing Co., Inc.
Quality Mattress Company.
Reed Glass Company, F. E.
Richardson Corporation.
Ritter Co., Inc.
Rochester Button Company.
Rochester Brewing Co., Inc.
Rochester Folding Box Co.
Rochester Gas & Electric Corp.
Rochester Germicide Company.
Rochester Ice & Cold Storage Utilities, Inc.
Rochester-Kelso Laundry.
Rochester Mfg. Co., Inc.
Rochester Packing Co., Inc.
Rochester Poster Adv. Company.
Rochester Products Division, General Motors Corporation.
Schlegel Mfg. Co., The.

Rochester—Continued.
Smith Mfg. Company, F. A.
Smith Company, Hngerford J.
Smith Co., Inc., John P.
Snider Packing Corporation.
Southern Wheel Company.
Star Palace Laundry.
Stetcher-Traung Lithographing Co.
Stein & Co., Wm. P.
Strasenburgh Co., R. J.
Stromberg-Carlson Telephone Mfg. Co.
Taylor Instrument Companies.
Trimble Nurseryland Furniture, Inc.
Vogt Manufacturing Corporation.
Rome:
Box Company, B. S.
General Cable Corp.
Kent Co., Inc., The.
New System Laundry & Dry Cleaners.
Parry Coal Co., W. W.
Revere Copper & Brass, Inc.
Rome Manufacturing Company.
Rome Soap Mfg. Company.
Rome-Turney Radiator Co.
Spargo Wire Company.
38 Salamanca:
Fancher Furniture Company.
Union Tanning Company.
Luminite Products Corporation.
Saugerties:
Saugerties Poster Adv. Company.
Schenectady:
Daily Gazette Company.
Empire Laundry.
Schenectady—Continued.
General Electric Company.
General Ice Cream Corporation.
Lowe & Sons, Inc., James E.
Schenectady Outdoor Adv. Co.
Schenectady Varnish Company.
United Wholesale Grocery.
Wilson Athletic Goods.
Seneca Falls:
Goulds Pumps, Inc.
Knight & Son, H. W.
Seneca Rules, Inc.
Seneca Knitting Mills, Inc.
Shortsville:
Paper Machine Company.
Silver Creek:
Howes & Co., Inc., S.
Skaneateles:
Lakeside Mill.
Skaneateles Mill.
Skaneateles Falls:
Draycott Mills, Inc.
South Otselic:
Bladding & Co., B. F.
Springville:
Gray Milling Co., Inc., James H.
Robinson Knife Company.
Smith, Inc., Winfield H.
Staatsburg:
Staatsburg Ice Tool Works.
Stottville:
Atlantic Mills, Inc.
Syracuse:
Associated Laundries, Inc.
Atlas Linen Supply Co., Inc.
Bendixen Tobacco Company.
Bronx & Thorn Dry Cleaning Corp.
Brown-Lipe-Chapin Div., General Motors Corporation.

Syracuse—Continued.
Central New York Power Corp.
Chamberlin, W. H. H.
Crouse-Hinds Company.
Dunning & Boschert Press Co., Inc.
Easy Washing Machine Corp.
Edwards Co., Inc., The O. M.
Engelberg Huller Co., The
Friedel Paper Box Co., J. F.
Gaylord Brothers.
Hall & McChesney, Inc.
Hill Top Laundry, Inc.
Hubbard Son & Co., Inc., Charles.
Joy Company, Edward.
Kilian Mfg. Corp.
Lipe Rollway Corporation.
Mack Miller Candle Company.
Marsellus Casket Co., Inc.
McMillan Book Company.
Muench-Kreuzer Candle Co., Inc.
Neal & Hyde, Inc.
Netherland Company, Inc.
Nettleton Company, A. E.
New Process Gear Corp.
Onondaga Pottery Company.
Onondaga Printing Company.
Palace Laundry.
Paragon Plaster Co., The.
Pass & Seymour, Inc.
39 People Ice Company.
Precision Castings Co., Inc.
Richards Advertising Co.
Rollway Bearing Co., Inc.
San-Equip, Inc.
Smith & Caffrey Company.
Smith & Corona Typewriters, Inc., L. C.
Solvay Process Co., The.

Syracuse—Continued.
Syracuse Chilled Plow Co., Inc.
Syracuse Electrotyping Corp.
Syracuse Glass Company.
Syracuse Home Family Laundry, Inc.
Syracuse Lighting Co., Inc.
Syracuse Ornamental Company.
Syracuse Rendering Company.
Syracuse Stamping Company.
Syracuse Supply Company.
U. S. Hoffman Machinery Corp.
Will & Baumer Candle Co., Inc.
Yale Laundry Company.
Ticonderoga:
American Graphite Company.
Ticonderoga Machine Works.
Ticonderoga Pulp & Paper Co.
Tonawanda:
Buffalo Steel Company.
Dunlop Tire & Rubber Corp.
Spaulding Fibre Company.
Troy:
Albia Box & Paper Company.
Behr-Manning Corp.
Cluett, Peabody & Co., Inc.
Cole Supply Co., Inc., Geo. H.
Covert Mfg. Company.
Freihofer Baking Co., Inc., Chas.
Gurley W. & L. E.
Ludlow Valve Mfg. Co., The.
Marvin-Neitzel Corp.
Manning Paper Co., John A.
Park Laundry.
Peterson & Packer Coal Co.
Poor & Company.

Troy—Continued.
Ross Valve Mfg. Co., Inc.
Troy Whitmier & Ferris Co.
Whitehurst Printing & Binding Co., The.
Wynantskill Mfg. Company.
Tupper Lake:
Oval Wood Dish Corporation.
Tully:
Cardner Box Company.
Union Springs:
General Products Corporation.
Utica:
Allen, Schmidt & Pringle, Inc.
Bossert Co., Inc., The.
Brandeles Corp., H. J.
Brunner Mfg. Company.
Divine Brothers, Inc.
Fort Schuyler Knitting Co.
Foster Bros. Mfg. Company.
Horrocks-Ibbotson Company.
International Heater Co.
Kellogg & Sons Co., Chas. C.
Lewis-Weller Mfg. Co., The.
Millar & Son Co., Charles.
Oneita Knitting Mills.
Powell Muffller Co., Inc.
Sauquoit Valley Farmers Cooperative, Inc.
Savage Arms Corporation.
Skenandoa Rayon Corp.
Smyth-Despard Company.
Emil Steinhorst &
40 Sons, Inc.
Utica & Mohawk Cotton Mills.
Utica Box Company, Inc.
Utica Drop Forge & Tool Co.
Utica-Duxbak Corporation.
Utica Knitting Company.
Utica Radiator Corp.
Utica Steam Engine & Boiler Works.
Utica—Continued.
Utica-Willowvale Bleaching Co.
Winship Company.
Walden:
Schrade Cutlery Company.
Warsaw:
Embury Manufacturing Co.
Warsaw Button Company.
Warsaw Elevator Company.
Waterford:
Laughlin Textile Mills, Inc.
Matton & Son, Inc., John E.
Watertown:
Knowlton Brothers.
Massey Machine Company.
Ontario Specialties, Inc.
Wise, Inc., J. B.
Watervliet:
Tilley Ladders Co., Inc., The John S.
Watkins Glen:
Watkins Salt Co., The.
Waverly:
Kasco Mills, Inc.
Tioga Mills, Inc.
Wayland:
Gunlocke Chair Co., W. H.
Wellsville:
Bradley Producing Corp.
Wellsville Burial Case Co.
Westfield:
The Welch Grape Juice Company.
Westmoreland:
Westmoreland Malleable Iron Co., Ltd.
White Plains:
Light Steam Laundry.
Suburban Laundry.
Whitesboro:
Kirk Guild, Inc.
Wilson:
Niagara County Preserving Corp.

Yonkers:
City Service Laundry, Inc.
Cleanart Laundry.
New System Laundry.
Alexander Smith & Sons Carpet Company.

Yonkers—Continued.
Westchester County Laundry Board of Trade, Inc.
Yonkers Outdoor Advertising Co.

41 In United States Circuit Court of Appeals

[Title omitted.]

Notice of motion

To Le Boeuf & Lamb:

Please take notice that the undersigned will bring the attached Motion to Dismiss Petition for Lack of Jurisdiction on for hearing before this Court in Room 1705 of the United States Court House in the City of New York, State of New York, on the 11th day of January 1943, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Warner W. Gardner,
Warner W. Gardner,
Solicitor, United States Department of the Interior, Attorney for Respondent, Harold L. Ickes.

Arnold Levy,
Arnold Levy,
General Counsel, Bituminous Coal Division, United States Department of the Interior, Attorney for Respondent, Dan H. Wheeler.

42 In the United States Circuit Court of Appeals

[Title omitted.]

Notice to dismiss petition for lack of jurisdiction

Respondents respectfully move the Court to dismiss the petition of Associated Industries of New York State, Inc., for review of an Order entered August 28, 1942, by respondent Dan H. Wheeler, Director of the Bituminous Coal Division, United States Department of the Interior, and an Order entered September 30, 1942, by respondent Harold L. Ickes, Secretary of the Interior, on the following grounds (as amplified in the brief attached hereto):

1. Petitioner, a membership corporation of the State of New York, which is not a producer, seller or purchaser of bituminous coal, but some of the members of which purchase bituminous coal, is not a "person aggrieved" by orders revising minimum prices

applicable to the sale of bituminous coal by code member producers, or entitled to seek review of such orders under the provisions of the Bituminous Coal Act of 1937 (Act of April 26, 1937, C. 127, 50 Stat. 72–90, 15 U. S. C., Secs. 828–851, extended by amendment, Act of April 11, 1941, 55 Stat. 134, 15 U. S. C. 849 et seq.).

2. Petitioner has no legal standing, interest, or right to maintain a petition for review of the contested orders in this Court.

43 3. This Court is without jurisdiction to review the contested orders on the petition of Associated Industries of New York State, Inc.

WARNER W. GARDNER,
Warner W. Gardner,

Solicitor, United States Department of the Interior, Attorney for Respondent, Harold L. Ickes.

ARNOLD LEVY,
Arnold Levy,

General Counsel, Bituminous Coal Division, United States Department of the Interior, Attorney for Respondent, Dan H. Wheeler.

44 United States Circuit Court of Appeals for the Second Circuit

No. — October Term, 1942

(Motion argued January 11, 1943. Decided February 8, 1943.)

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC., PETITIONER

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND DAN H. WHEELER, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, RESPONDENTS

Motion to dismiss for lack of jurisdiction a petition to review orders made by respondents, purporting to increase the minimum prices for bituminous coal in certain areas, including New York State. Motion denied.

Before SWAN, AUGUSTUS N. HAND and FRANK, Circuit Judges.

LeBoeuf and Lamb (Horace R. Lamb, James S. Brock, and Homer Crawford, of counsel,) for petitioner. Warner W. Gardner, Arnold Levy, Jesse B. Messitte, and Erwin B. Ellman, for respondent.

Opinion

Feb. 8, 1943

45 FRANK, Circuit Judge:

Petitioner, Associated Industries of New York, Inc., is a New York membership corporation, the members of which are New York industrial and commercial firms and corporations, many of which are substantial consumers of coal. It has filed a petition here to review orders made by respondents under the purported authority of the Bituminous Coal Act of 1937 (15 U. S. C. § 828, et seq.). Respondents are the successors of the former National Bituminous Coal Commission, which was abolished in 1939, under the terms of the President's Reorganization Plan No. II, effective July 1, 1939, 53 Stat. 1433, pursuant to the Reorganization Act of 1939 [Public Resolution 2, 53 Stat. 561], when its functions were transferred to a bureau in the Department of Interior, designated by the Secretary of the Interior, that bureau being called the Bituminous Coal Division. Respondent Ickes is the Secretary of the Department of Interior. Respondent Wheeler is Director of the Bituminous Coal Division. We shall at times refer to the respondents as the "Commission," both in the interest of convenience, and because the Act retains that term. The orders in question direct the increase, by 20 cents per ton, of the minimum prices for bituminous coal, produced in Minimum Area No. 1,[1] and sold in a designated market area which includes New York State.

On May 15, 1938, the Commission began a proceeding entitled General Docket No. 15, in order to carry out the provisions of the Act which call for the establishment of minimum
46 prices.[2] After extensive hearings, the Commission made determinations of the weighted average costs of producing coal in each production district. These figures were submitted to the district boards,[3] which in turn suggested prices and price

[1] See footnote 3.

[2] § 4 II (a) of the Act provides that "* * * each district board shall determine from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the ascertained tonnage, produced in the district in the calendar year 1936 * * *. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area * * * and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective, until changed by the Commission, for the proposal and establishment of minimum prices." § 4 II (b) of the Act requires the district boards to "coordinate in common consuming market areas upon a fair competitive basis," the minimum prices thus proposed. The Commission then may establish minimum prices on the basis of such proposed coordinate prices. The Commission is also directed "from time to time * * * to review and revise the effective minimum prices."

[3] § 4 of the Act provides for the organization of producers of coal, as members of the bituminous coal code, into 23 district boards of code members, each board to consist of "not less than three and not more than 17 members." The district boards are charged with the function of proposing "reasonable rules and regulations incidental to the sale and distribution, by code members within the district of coal." A schedule

classifications for their respective districts as a basis for the coordination of prices among the various districts. A hearing was held on these proposals and, in December 1938 and January and February 1939, the Commission issued orders, establishing the minimum prices and price classifications, on which basis prices were to be coordinated. In order to fix coordinated price schedules, the final step in the price-fixing process, hearings were instituted in May 1939, and the trial examiners submitted their recommendations in March and April 1940 to the then
47 Director of the Bituminous Coal Division. In May and June 1940, he heard the arguments of approximately 289 petitioners, and, after reviewing the record, issued findings of fact and conclusions of law, and established minimum prices based thereon. Exceptions were filed with respondent Ickes, who, on September 24, 1940, approved them subject to certain modifications. On October 1, 1940, the prices finally became effective upon the order of respondent Ickes.

General Docket No. 21—in which the orders sought to be reviewed were made on August 28 and September 30, 1942—was a proceeding instituted by the Commission "for the purpose of revising the present minimum prices heretofore established in General Docket No. 15 * * *." A hearing was initiated on May 21, 1941, before an examiner of the Commission to determine the nature and extent of cost changes. Appearances were entered on behalf of the District Boards, 115 code members and 225 other persons, including the petitioner. Petitioner was served with notice of the hearing and actively participated therein. Petitioner after entering its appearance was granted leave to file a list of its members. The examiner submitted his report and respondent, Wheeler, the Director of the Commission, after hearing arguments thereon, issued determinations of the weighted cost of production in the various minimum price areas. Respondent Ickes then reviewed, at the behest of the petitioner and others, the methods and standards which Wheeler had employed in determining weighted average cost increases, and in an opinion dated April 13, 1942, held them to be suitable and proper. Hearings on the problem of adjustment of minimum prices, in the light of the changes that had taken place, were begun on May 5, 1942. Here also, petitioner entered an appearance and actively participated. On July 27, 1942, the examiner recommended that effective minimum prices established in General Docket No. 15 for Mini-
48 mum Price Area I, for shipments into Market Areas 2 and 4 be increased by 20 cents per ton. Petitioner and others

of districts may be found in the Annex to the Act, following 15 U. S. C. § 851. The Districts, in turn, are grouped into ten minimum price areas "corresponding roughly to the scope of the several wage contracts between operators and the union." Rostow, Bituminous Coal & the Public Interest, 50 Yale L. J. 543, 568 (1941). The appendix to § 4 I (a) contains a table of the minimum price areas.

filed exceptions, and after hearing oral arguments and considering the briefs filed, the Director, on August 28, 1942, adopted the examiners' report subject to certain modification. At the same time he ordered the revised minimum prices to become effective on October 1, 1942. Petitioner and other participants in the proceedings then obtained a review by respondent Ickes of certain questions of law and policy. On September 30, 1942, he issued an order, affirming the determinations of the Director on such matters as were within the scope of the review. Pursuant thereto and to the Director's order of August 28, 1942, the adjusted minimum prices went into effect on October 1, 1942.

In the course of proceedings leading up to these orders, petitioner was permitted to examine witnesses, file briefs and make oral arguments; the Director in an order stated, "Associated Industries of New York State, Inc., has made a written request * * *"; the Acting Director in findings of fact expressly referred to exceptions and arguments made by petitioner, naming it; the Director noted contentions made by "two representatives of consumer interests, namely Bituminous Coal Consumers' Counsel and Associated Industries of New York"; respondent Ickes, in an order and opinion, discussed at length contentions advanced by petitioner, naming it repeatedly; a trial examiner stated in his report that "the consumer interests were also represented by counsel for the Associated Industries."

This petition seeks review under Section 6 (b) of the Act, of the two orders of August 28, 1942, and September 30, 1942. It alleges, inter alia, that, in promulgating them, the respondents acted beyond the scope of the authority conferred upon them by the Act, and that the orders were based on findings of fact which are not supported by substantial evidence. The respondents have moved to dismiss the petition for want of jurisdiction.

49 The record is exceedingly voluminous and neither party has, in connection with this motion, given us any citations to any portions thereof. We have therefore not undertaken, at this time, to examine the record, but have relied, as to record facts pertinent on this motion, on statements of fact in the briefs of one party when not contradicted by the other.

1. By its very nature, respondents' motion to dismiss the petition requires us to assume, merely arguendo of course, that the situation is just as it would be if we had heard petitioner on the merits and were satisfied that respondents' orders were invalid because made in violation of respondents' statutory powers and for the precise reasons set forth in the petition. The motion to dismiss is not based on any contention as to the general nonreviewability of the orders or their validity, but solely on the contention that, assuming them to be invalid and reviewable, peti-

tioner is not the kind of person entitled to seek court review. Respondents' basic position is frankly that consumers of coal can never appear in court to complain of such price-fixing orders, even if invalid, no matter how great the financial burdens imposed on those consumers by the increase in the cost of coal which will result from those orders. Respondents enthusiastically grant that Congress intended in the Act to safeguard the interests of consumers, but respondents say that those interests are, for purposes of court review, exclusively represented by a government official, the Bituminous Coal Consumers' Counsel, appointed pursuant to § 2 (b) of the Act,[4] and that that official, while authorized to do so, has not sought court review of these orders.

50 2. Section 6 (b) of the Act expressly authorizes "any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party" to seek review by a petition in an appropriate United States Circuit Court of Appeals. There is no possibility of denying that respondents, in the administrative proceedings which led to these orders, recognized petitioner as a party representing consumers. Respondents, in their briefs indeed, ask us to assume, for purposes of this motion, that petitioner was thus a party.

Respondents, however, insist that petitioner is not a "person aggrieved" by the orders. They assert that those words mean merely to describe the kind of persons who, in the absence of § 6 (b), would have had a "standing" to maintain a suit in a district court seeking to enjoin respondents from enforcing its order or a declaratory judgment with respect to the validity of those orders. In considering that contention, it is necessary to have in mind that an action in a Court of Appeals to review administrative orders under such a provision as that contained in

51 § 6 (b) is a suit begun in an appellate court, i. e., that such provision has the effect of conferring original jurisdiction upon an appellate court; such a proceeding is sometimes called an "appeal" but it is, of course, not the equivalent of an appeal from a lower court, since the proceedings under review were not judi-

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[4] Sec. 2 (b) of the Act of 1937 established "an office in the Dept. of the Interior, to be known as the office of the consumers' counsel of the National Bituminous Coal Commission." The Counsel was to be appointed by the President, with the consent of the Senate. He was empowered to conduct such independent investigations as were necessary to "enable him to properly represent the consuming public in any proceeding before the Commission." He was further authorized to appoint necessary professional and clerical assistants.

On July 1, 1939, pursuant to the provisions of Reorg. Plan No. II, § 4 (c) following 5 U. S. C. A. § 133t, the office of Consumers' Counsel of the National Bituminous Coal Commission was abolished and its functions transferred to the office of the Solicitor of the Department of the Interior.

It was not until the subsequent passage of § 22 of the Act (15 U. S. C. A. § 852), in 1941, that the present independent character of the office of the consumers' counsel was fully established. That section established the office of the Bituminous Coal Consumers' Counsel. This new office is expressly made a part of the executive branch of the government. The counsel is appointed by the President, subject to the consent of the Senate. All the functions formerly conferred upon the Consumers' Counsel of the National Bituminous Coal Commission, which were transferred by

cial.[6] In the absence, then, of an appropriate statutory provision, such as § 6 (b) of the act here, a suit of this kind, assailing administrative orders, could be brought only in a district court. In other words, the review proceeding is, in effect, a substitute for a district court injunction or declaratory judgment suit. It follows that the doctrine of so-called "standing to sue,"[6] as worked out in district court injunction or declaratory judgment suits against government officers, is applicable to the present review proceedings.

That doctrine, as ordinarily applied, may be summarized as follows: In a suit in a federal court[7] by a citizen against a government officer, complaining of alleged past or threatened
52 future unlawful conduct by the defendant, there is no justiciable "controversy," without which, under Article III, § 2 of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interest must be either of a "recognized" character,[8] at "common law" or a substantive private legally protected interest created by statute.[9] In other words, unless the citizen first shows that, if the defendant were a private person having no official status, the particular defendant's conduct or threatened conduct would give rise to a cause of action against him by that particular citizen, the court cannot consider whether the defendant officer's conduct is or is not authorized by tsatute,[9a] for the statute comes into the case, if at all, only by way of a defense or of justification for acts of the defendant which would be unlawful as against the plaintiff unless the defendant had official authority, conferred upon him by the statute, to do those

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Reorganisation Plan No. II to the office of the Solicitor of the Department of the Interior, were by this section, conferred upon the office of the Bituminous Coal Consumers' Counsel.

[6] F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134, 141–145.

A "constitutional" federal court (as distinguished from "legislative" courts or those which, like the courts of the District of Columbia, are both "legislative" and "constitutional" courts) cannot, constitutionally, because of Article III, § 2 of the Constitution, be given power to sit in judgment and revise administrative action, since then there is no justiciable "controversy": the issues before such a court on such a review must therefore be restricted to those relating to conformity by the administrative officials with their statutory powers and duties. Keller v. Potomac Elec. Co., 216 U. S. 428; Radio Comm. v. Nelson Bros. Co., 289 U. S. 266; F. C. C. v. Pottsville Broadcasting Co., supra; cf. O'Donoghue v. U. S., 289 U. S. 516.

[6] The phrase is perhaps not too felicitous, for anyone has, in a certain sense, a "right" to bring any kind of suit in any court: a man can institute an original action for divorce in the Supreme Court: his suit will be dismissed but he will only suffer costs, just as he would if he brought a suit in a court of proper jurisdiction and lost on the merits.

[7] Subject to the exceptions indicated in note 5, supra.

[8] Perkins v. Lukens Steel Co., 310 U. S. 113, 125.

[9] See, e. g., School of Magnetic Healing v. McNulty, 187 U. S. 94; Tenn. El. Power Co. v. T. V. A., 306 U. S. 118, 137–138; cf. comment on The Chicago Junction Case, 264 U. S. 258 in Alabama Power Co. v. Ickes, 302 U. S. 464, 482–484.

[9a] Of course, the discussion here is not applicable to a suit by a citizen to compel an officer affirmatively to perform a plain ministerial duty owed to that citizen. See e. g., Board of Liquidation v. McComb, 92 U. S. 531, 541.

acts.[10] Unless, then, the citizen first shows that some substantive private legally protected interest possessed by him has been invaded or is threatened with invasion by the defendant officer thus regarded as a private person, the suit must fail for want of a justiciable controversy, it being then merely a request
53 for a forbidden advisory opinion.[11] That the plaintiff shows financial loss on his part resulting from unlawful official conduct is not alone sufficient for such a loss, absent any such invasion of the plaintiff's private substantive legally protected interest, is damnum absque injuria. Thus, for instance, financial loss resulting from increased lawful competition with a plaintiff, made possible solely by the defendant official's unlawful action, is insufficient to create a justiciable controversy.[12] More is required "than a common concern for obedience to law."[13] There is the related rule[14] that Congress cannot constitutionally enact a statute authorizing a suit to be brought to test out the abstract question of the constitutionality of the statute where there is no actual justiciable controversy.[15]

3. Insisting that that doctrine, substantially as above outlined, is fully applicable here, respondents cite as directly in point the memorandum opinion in City of Atlanta v. Ickes, 308 U. S. 517. There a city, as a substantial coal consumer, brought a suit
54 in a federal district court, to enjoin the coal Commission from establishing minimum prices by orders, alleged to be invalid, purporting to have been issued pursuant to the Act now before us, and for a declaratory judgment that the Act was unstitutional. The trial court, holding that it had jurisdiction, dismissed the suit on the merits.[16] On appeal, the Supreme Court affirmed, but not on the merits, holding that the trial court was without jurisdiction. The opinion in its entirety reads as follows: The judgment is affirmed on the ground that the appellant has no standing to maintain this suit. Tenn. Power Co. v. T. V. A., 306 U. S. 118, 138, 141; Alabama Power Co. v. Ickes,

[10] See, e. g., Cunningham v. Macon & Brunswick R. R. Co., 109 U. S. 446, 456; Poindexter v. Greenhow, 114 U. S. 270, 287; Ex parte La Prade, 289 U. S. 444, 455. See discussion in Hammond-Knowlton v. U. S. 121 F. (2d) 192, 194–195 and notes 5 and 7 (C. C. A. 2).

[11] Cf. Aetna Life Ins. Co. v. Haworth, 300 U. S. 227.

[12] Alabama Power Co. v. Ickes, supra; Tenn. El. Power Co. v. T. V. A., supra.

[13] L. Singer & Sons v. Union Pac. R. Co., 311 U. S. 295, 304; Perkins v. Lukens Steel Co., supra.

[14] Muskrat v. U. S., 219 U. S. 346.

[15] It has been suggested that dismissal of such a suit or proceeding for lack of "standing" is not a dismissal for want of jurisdiction. Cf. Duke Power Co. v. Greenwood County, 81 F. (2d) 989, 999 (C. C. A. 5). But the lack of such "standing" appears to have been regarded as the equivalent of lack of a justiciable controversy which, in turn, means a lack of constitutional power in the court to hear the case. Such constitutional lack of power would seem clearly to constitute want of jurisdiction. Such was the ruling in Mass v. Mellon, 262 U. S. 447, 480; cf. Muskrat v. U. S., 219 U. S. 346, 363; Rochester Tel. Co. v. U. S. 307 U. S. 125, 131; Aetna Life Ins. Co. v. Haworth, supra, at 240.

[16] 26 Fed. Supp. 606 (D. C. Dist. of Col.).

302 U. S. 464, 478–479; Sprunt & Son v. U. S. 281 U. S. 249, 255–256; Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240–241."[17]

55 There can be little doubt, then, that if this Act made no provisions for review in a Court of Appeals and if (without any statutory provision covering the mode of bringing such actions[18]) petitioner had brought a suit in a district court, setting forth the allegations now contained in its petition, and seeking an injunction or declaratory judgment, the City of Atlanta decision would have been in point, and dismissal of the suit would have been necessary. But the City of Atlanta case was not an action brought in a Court of Appeals under § 6 (b) and consequently did not raise the question whether a "person aggrieved" in that section means merely the sort of person who would have "standing to sue" in the absence of a statutory provision thus worded.[18] For light on the effect of such a provision, we must turn to two cases subsequently decided.

4. In those cases, F. C. C. v. Sanders Radio Station, 309 U. S. 470, and Scripps-Howard Radio, Inc., v. F. C. C., 316 U. S. 4, it has been held that a "person aggrieved," seeking review under such a statutory provision need not show that he has such a "standing" as is ordinarily required either in injunction suits to restrain action by officials alleged to be unlawful or in declaratory judgment suits brought to determine the validity of such action.[19]

In the Sanders case, the Telegraph-Herald, a newspaper, filed with the Communications Commission an application for a

56 permit to erect a broadcasting station in Dubuque, Iowa. Subsequently, Sanders Bros. Radio Station, which had, for some years, held a broadcasting license for, and had operated a

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[17] In the Second Annual Report of the Commission, for the fiscal year 1938 (p. 21), in referring to the City of Atlanta case then pending in the District Court, it was stated that the Commission had filed a motion to dismiss on the ground that the City had no standing to bring such a suit but "must avail itself of the administrative and judicial remedies" provided in the Act. In the Third Annual Report under the Act, transmitted by respondent Ickes to Congress on January 3, 1940, it is said (p. 27) that, in the Supreme Court, the motion to dismiss had been based on the grounds, inter alia, that "there was no equity jurisdiction since the Act itself provided plaintiff with an adequate remedy." Those statements serve to show that respondents were urging that consumers, instead of suing in the District Court, should seek judicial relief under the provisions of the Act, i. e., § 6 (b).

It is interesting, in this connection, to note that in the Second Annual Report of the Commission (p. 4) it was stated that "the entire procedure of establishing minimum prices must be so conducted as to afford *any interest* producer or *consumer* an opportunity to present his views, to lay his grievances before the Commission, and, having exhausted other avenues of relief, to *appeal his case to the courts.*" [Italics added.]

Since, in the City of Atlanta case, the City attacked the constitutionality of the Act, there might have been a question whether § 6 (b) was available. We need not consider that question which, in any event, is now academic because the constitutionality of the Act has been sustained in Sunshine Coal Co. v. Adkins, 310 U. S. 381.

[18] Section 6 (d) provides that the jurisdiction of the Courts of Appeal "to set aside or modify orders of the Commission shall be exclusive."

[19] Coleman v. Miller, 307 U. S. 433, has, we think, no bearing here, because, inter alia, as the Supreme Court pointed out, it related to an appeal to the United States Supreme Court, from a state court decision, involving a claim of right and privilege under the Constitution, and did not relate to the "standing" to maintain an original suit in the first instance in a federal court—which is the question before us here.

station at East Dubuque, Illinois, directly across the Mississippi River from Dubuque, applied for a permit to move its station to Dubuque. It then asked leave to intervene in the Telegraph-Herald proceeding. Intervention was permitted by the Commission and both applications were heard in a consolidated hearing. The Commission granted both applications. On Sanders' petition for review in the Court of Appeals, it was held that the Commission's order granting a license to the Telegraph-Herald was invalid because the Commission had failed to make any findings as to whether Sanders would suffer "economic injury" from the resulting competition. On certiorari, the Supreme Court held that the "economic injury" to a rival station is not, in and of itself and apart from consideration of public convenience, interest, or necessity, an element which the Commission was obliged to weigh or as to which it must make findings in passing on applications for a broadcasting license. The court said that the Act recognizes that the field of broadcasting is one of free competition, that Congress had not in the Act "abandoned the principal of free competition," that "the broadcasting field is open to anyone," and that the policy of the Act was clearly that "no person is to have anything in the nature of a property right as a result of the granting of a license, it being plainly not the purpose of the Act to protect the licensee against competition but to protect the public." It said that while the Commission should take into account the question of competition in its bearing upon the ability of the applicant adequately to serve the public, such matters "are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. If such economic loss were a valid reason for refusing a license, this would mean that
57 the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act expressly negatives * * *." Nevertheless, the court went on to say: "It does not follow that, because the licensee of the station cannot resist the grant of a license to another, on the ground that the resulting competition may work injury to him, he has no standing to appeal from an order of the Commission granting the application. Section 402 (b) of the Act provides for an appeal to the Court of Appeals of the District of Columbia (1) by an applicant for a license or permit, or (2) 'by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.' The petitioner insists that as economic injury to the respondent was not a proper issue before the Commission, it is impossible that § 402 (b) was intended to give the respondent standing to appeal, since *absence*

of right implies absence of remedy. This view would deprive subsection (2) *of any substantial effect.* Congress had some purpose in enacting § 402 (b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. *It is within the power of Congress to confer such standing to prosecute an appeal.* We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission. Compare Interstate Commerce Commission v. Oregon-Washington R. Co., 288 U. S. 14, 23–25."[20] The court then went on to consider alleged defects in the Commission's findings and held that they complied with the statutory requirements as to the public interest.

58 In the Scripps-Howard case, supra, the same doctrine as to "standing" was reiterated. There the Communications Commission granted, without hearing, the application of WCOL, Inc., a licensee of a broadcasting station in Columbus, Ohio, for a permit allowing it to change its frequency from 1210 to 1200 kilocycles and to increase its power from 100 to 250 watts. Scripps-Howard Radio, Inc., licensee of a station in Cincinnati, Ohio, operating on a frequency of 1200 kilocycles with a power of 250 watts, filed a petition requesting the Commission to vacate its previous order and set the application of WCOL for hearing. The Commission denied this petition. Scripps-Howard filed a petition for review in the Court of Appeals, and then asked that court to stay the Commission's order pending the disposition of the review action. The six judges of the court, being equally divided on the question of the power to grant a stay, certified it to the Supreme Court which held that the Court of Appeals had that power. The majority opinion said: "The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402 (b) (2), Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action. But *these private litigants have standing only as representatives of the public interest.*[21] Federal Communications Commission v. Sanders Radio Station, 309 U. S. 470, 477. Cf. National Licorice Co. v. Labor Board, 309 U. S. 350, 362–363. That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights. 'Courts of equity may, and frequently do, go much

[20] Italics added.
[21] Italics added.

farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' Virginian Ry. Co. v.
59 Federation, 300 U. S. 515, 522. An historic procedure for preserving rights during the pendency of an appeal is no less appropriate—unless Congress has chosen to withdraw it—because the rights to be vindicated are those of the public and not of the private litigants."

The following portion of the minority opinion [21a] (which states substantially the argument made by respondents here) further illuminates the position of the majority of the court in the Scripps-Howard case: "Repeated attempts of private litigants to obtain a special stake in public rights have been consistently denied. See Massachusetts v. Mellon, 262 U. S. 447; Sprunt & Son v. United States, 281 U. S. 249; Alabama Power Co. v. Ickes, 302 U. S. 464; Tennessee Electric Power Co. v. T. V. A., 306 U. S. 118; Atlanta v. Ickes, 307 U. S. 517; Singer & Sons v. Union Pac. R .Co., 311 U. S. 295. The attempt to obtain a stay is but another manifestation, albeit oblique, of that same endeavor * * * For that reason alone, § 402 (b) should be read narrowly and restrictively. But it is said that Congress entrusted the vindication of the public interest to private litigants. The Sanders case, properly construed, merely means that the Court of Appeals has jurisdiction of appeals by a 'person aggrieved' or by one 'whose interests are adversely affected' by the Commission's decision. § 402 (b). But that does not mean that an appellant has a cause of action merely because he has a competing station. Unless he can show that his individual interest has been unlawfully invaded, there is merely damnum absque injuria and no cause of action on the merits. Alabama Power Co. v. Ickes, supra; Greenwood County v. Duke Power Co., 81 F. (2d) 986, 999. And see Duke
60 Power Co. v. Greenwood County, 302 U. S. 485. Congress could have said that the holder of a radio license has an individual substantive right to be free of competition resulting from the issuance of another license and causing injury. In that event, unlike the situation in Muskrat v. U. S. supra, there would be a cause of action for invasion of a substantive right. But we have said in the Sanders case, Congress did not create such a substantive right. And no facts are shown here which would bring this appeal outside the rule of that case. On that assumption, I fail to see how an appeal statute constitutionally could authorize a person who shows no case or controversy to call on the courts to review an order of the Commission."

[21a] The writer of this opinion confesses that, before the decision in the Scripps-Howard case, he had interpreted the Sanders case as it was interpreted in the minority opinion in the Scripps-Howard case.

5. With the majority opinion illuminated by that dissent, we believe that the usual "standing to sue" cases can be reconciled with the Sanders and Scripps-Howard cases,[22] as follows: While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally
61 enact a statute[23] conferring on any nonofficial person, or on a designated group of nonofficial persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

Thus recently, the Supreme Court in United States ex rel. Marcus v. Hess, — U. S. —, affirmed a judgment in favor of a citizen under the so-called Federal Informers Act; that Act[24] authorized a qui tam action by "any person," in behalf of the government, to institute and prosecute to judgment a suit to recover the fines and double damages due to the United States by one who obtains money from it by fraudulent claims, one-half of the recovery being paid to the person who institutes the suit and the other half to the government. The court said, "Qui tam suits have been frequently permitted by legislative action * * * Congress has power to choose this method to protect the government from claims fraudulently imposed upon it * * * 'Statutes providing for actions by a common informer, *who himself has no interest whatever in the controversy other than that given by statute*, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government.' Marvin v. Trout, 199 U. S. 212, 225."[25]

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[22] See Singer & Sons v. U. P. R. Co., 311 U. S. 295, 307–308; Rochester Tel. Corp. v. U. S., 307 U. S. 125, 131–134; Coleman v. Miller, 307 U. S. 433, 460, 467; Advisory Opinions, 1 Encyc. Soc. Sc. 475.

[23] That the Declaratory Judgment Act is not such a statute is clear from the decision in City of Atlanta v. Ickes, supra.

[24] 31 U. S. C., §§ 231–234.

[25] Italics added.

The court, in the Sanders and Scripps-Howard cases, as we understand them, construed the "person aggrieved" review provision as a constitutionally valid statute authorizing a class
62 of "persons aggrieved" to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded.[26] Although one threatened with financial loss through increased competition resulting from unlawful action of an official cannot, solely on that account, make the proper showing to maintain a suit against the official, absent such a statute, yet the "person aggrieved" statute gives the needed authority to do so to one who comes within that description. True, in the Sanders and Scripps-Howard cases, the review provisions of the statute referred not only, as here, to a "person aggrieved" but also to a "person adversely affected" by the administrative order; we think, however, that the omission of the latter clause in § 6 (b) of the Act before us makes no significant difference. If, then, one is a "person aggrieved," he has authority by review proceedings under § 6 (b), to vindicate the public interest involved in a violation of the Act by respondents, even if he can show no past or threatened invasion of any private legally protected substantive interest of his own.

6. Of course, not every person is a "person aggrieved." But the Supreme Court has explicitly told us that one threatened with financial loss through increased competition resulting from a Commission's order is "aggrieved," and entitled as such to a review notwithstanding that the very statute pursuant to which he obtains review is designed to keep competition alive and confers upon him no property right which gives him any kind of immunity from competition. It would seem clear, then, that
63 a consumer threatened with financial loss by a Commission's order, which fixes prices and prevents competition among those from whom the consumer purchases, is also a "person aggrieved." Indeed there is more reason why Congress should be deemed to have intended to confer such a power on consumers than to authorize a holder of a radio station license to obtain review of an administrative order, issued under the Communication Act, subjecting him to increased competition. For the common law has always zealously regarded competition as inherently desirable.[27] And Congress has usually reinforced that policy leg-

[26] Cf. I. C. C. v. Oregon-Wash. R. Co., 288 U. S. 14, 26 (cited and relied on in the Sanders case, supra) where, in construing a statute authorizing an "appeal to the Supreme Court * * * by an aggrieved party," the court said, "The section can be given effect only by holding that an aggrieved party may challenge the decree not only to vindicate his own rights but those of the United States as well."

[27] For a discussion, pro and con, of the wisdom of that tradition, see Brandeis, J., in New State Ice Co. v. Liebman, 285 U. S. 262, 280, 306–310; cf. Holmes, Collected Legal Papers (1921) 121, to the effect that the common law tradition is based on the "economic postulate that free competition is worth more to society than it costs."

islatively, as manifested in the Anti-Trust laws, except in unusual circumstances, such as those which induced the passage of the Act here before us;[28] since such a statute is patently an exception, it should surely be construed, if possible, in such a way as not to blot out all protection to consumers. As respondents themselves freely acknowledge in their briefs, several sections of the Act show that Congress (recognizing that this legislation was granting immunity to coal producers from the provisions of the Anti-Trust laws) was bent on giving adequate offsetting protection to con-
64 sumers.[29] Thus § 4 II (a)[30] provides that minimum prices proposed as a basis for coordination "shall have due regard to the interest of the consumer public," and § 4 II (c) refers to protection "of the consumers of coal against unreasonably high prices therefor."[31]

7. The Act imposes heavy penalties for violation of Commission orders on persons from whom consumers purchase coal. Relief has often been granted against enforcement of statutes in suits by persons not themselves subject to such statutory penalties; to be sure, in each such case, the complainant was able to show the threatened invasion of personal substantive interest;[32] but here, as we have seen, a consumer is not obliged, under § 6 (b), to make such a showing, and therefore it cannot be argued that petitioner is precluded from court review merely because the statute does not operate directly upon consumers; in the Sanders and in the Scripps-Howard case, review was accorded to a competitor, as a "person aggrieved," although the order complained of was not directed against him, it being held sufficient that he would suffer financially, as a result of the order.[33]

8. Respondents argue that it has been held that consumers
65 have not a sufficient interest to justify their intervening in court suits to restrain rate orders issued by a State Commission,[34] and therefore should not be deemed persons "aggrieved" under § 6 (b). But those decisions, even assuming that they are

[28] See Sunshine Coal Co. v. Adkins, 310 U. S. 381, 394–396, as to the deplorable conditions which led to its enactment; cf. Rostow, Bituminous Coal and the Public Interest, 50 Yale L. J. 543; Hamilton, Coal and the Economy, A Demurrer, 50 Yale L. J. 595, and Rostow, Joinder in Demurrer, 50 Yale L. J. 613.

[29] For another typical instance of Congressional concern for consumers, see the Public Utility Holding Company Act, Title 15 U. S. C. § 79 (a), et seq.; see, e. g., § 79 (f)b.

[30] Referred to in Sunshine Coal Co. v. Adkins, 310 U. S. 381, 397.

[31] See also § 15 referring to "coal prices" which "are excessive and oppressive of consumers."

[32] See, e. g., Truax v. Raich, 239 U. S. 33; Pierce v. Society of Sisters, 268 U. S. 510.

[33] As a consequence, there is no force to the following contention made by respondents: "The fact that a code member is required under the Act to preserve an established price level, in its transactions with consumers, no more invades the legal rights of such consumers than if the code member, in the absence of statutory regulation, voluntarily increases prices to the same level."
Moreover, that argument ignores the fact that, were it not for valid orders issued pursuant to this statute, the code members, if they raised their prices by agreement among themselves, might be subject to the penalties of the Anti-Trust laws.

[34] City of New York v. N. Y. Tel. Co., 261 U. S. 312, 316; Smith v. Illinois Bell Tel. Co. 270 U. S. 587, 592; cf. In re Engelhard, 231 U. S. 646, 651.

otherwise in point, were made in cases where there was no statute, such as we have here, authorizing suit by any "person aggrieved." Absent such a statute, there have been, as above noted, similar decisions as to suits by competitors, but those decisions were given no weight in the Sanders and Scripps-Howard cases where there was such a statute.

Moreover, the cases dealing with interventions by consumers in suits attacking state commission rate orders are unlike the case at bar. For instance, in City of New York v. New York Tel. Co., 261 U. S. 312, 316, a state commission had made orders reducing telephone rates in the New York City area and the telephone company brought suit to enjoin those orders, making the commission and the State Attorney General parties defendants. The City moved to be made a party defendant in those suits, in order to assist in defending the Commission's orders; the trial court denied the motion; the Supreme Court held that it was within the discretion of the trial court to refuse to allow the City to become a defendant, since its interest and those of its residents were adequately represented by the State Commission and the Attorney General.[35] In such a case, the public officials are in court defending an order benefiting consumers by reducing rates, and the consumers are not complaining that the order adversely affects them but, on the contrary, want to help to persuade the court to sustain the order; in such circumstances, it is
66 easy to see why the Supreme Court has held that it is within the discretion of the trial court to deny intervention to consumers. But here the petitioner, on behalf of consumers, complains that the respondents' orders adversely affect consumers and no official is assailing those orders on their behalf; if respondents' motion were granted, there could, on those facts, never be any court proceeding in which any consumers could be heard to complain of the orders. The situation here would be analogous to that in the cases cited, if Consumers' Counsel had brought review proceedings, and if petitioner or other representative of consumers then sought to intervene; conceivably (although we do not here decide the question) in such a case we would have discretion to permit or deny such intervention.[36]

[35] The Smith and Engelhard cases, supra, are of a similar character.

[36] Wright v. Central Ky. Gas Co., 297 U. S. 537, cited by respondents, did not relate to the "standing to sue" of consumers. There a utility company, by a contract with a city, purchased a franchise for the distribution and sale of gas to consumers in that city. The contract provided that the company should promulgate rates and that, if the city deemed them to be excessive, proceedings should be instituted before the state commission in order to have reasonable rates prescribed; the contract also provided that, pending proceedings before the Commission and any subsequent court proceedings, the company should have the right to charge specified temporary rates but with a proviso that a certain amount collected under such rates should be impounded pending the final rate determinations and should be distributed under the order of the Commission or of the court to the company or its customers. The company promulgated a rate schedule, the city objected, and there were Commission proceedings resulting in an order prescribing rates. The company brought suit attack-

9. Respondents contend that Congress could not have intended to construe § 6 (b) to include consumers, because such
67 an interpretation will open up the "possibilities of separate law suits by hundreds of thousands of individual consumers" attacking Commission orders, with the result of impairing the effective administration of a statute designed for the stabilization of the coal industry. But there are no such horrendous possibilities. A review proceeding under § 6 (b) must be brought within sixty days after the entry of the Commission's order and only in one of the eleven Circuit Courts of Appeal; a decision in one such action in any one of those courts would ordinarily be, at least, stare decisis in that same court. Moreover, § 6 (b) contains a provision to the effect that, upon the filing in a Court of Appeals of a petition for review and of the transcript of the administrative proceeding, "such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part." That language, in other statutes, has been construed to mean that where a petition to review an order has been filed by any aggrieved person in any one Court of Appeals, no other Court of Appeals will entertain a review petition
68 with respect to that same order subsequently filed by another aggrieved person.[37] And if, despite those rulings, there should be differences in decisions between the several Courts of Appeal, such differences will usually soon be composed because, ordinarily, they will induce the Supreme Court to grant certiorari.

10. Respondents assert that petitioner has waived its right, if any, to proceed under the legal theory on which the petitions to review were sustained in Sanders and Scripps-Howard cases, because petitioner, in its original brief, stated that "it does not attempt to assert any general public right to review the provisions of the orders insofar as they may affect other market areas and

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ing these rates; the court denied injunction and directed distribution of the impounded fund; this decree was reversed by the Supreme Court. The City and the company then entered into a compromise contract agreeing upon a rate for the future and providing for distribution of the impounded fund. The company then brought suit in the state court for a declaratory judgment as to the rights of the company. Another suit was filed by a gas consumer seeking an injunction directing the company to furnish him gas at a specified rate; the two cases were consolidated, and later other consumers were permitted to file an intervening petition in the company's suit against the City. The state court upheld the compromise contract against the objections of the consumer parties who contended that they were being deprived of vested property rights in the impounded funds. On appeal to the United States Supreme Court, the state court judgment was affirmed. The court said that the appellate consumers had no vested right which precluded the City from effecting a reasonable adjustment of the controversy. In that connection it said: "In making that settlement as well as in the making of the original franchise contract, the consumers were represented by the City." It is plain that this remark related to the alleged substantive rights of the consumers and had nothing to do with their "standing to sue." They were permitted to sue, the decision of the Supreme Court was on the merits and did not consist of a dismissal for want of jurisdiction.

[37] L. J. Marquis & Co. et al. v. S. E. C. (C. C. A. 2, memorandum opinion, dated December 23, 1942); Okin v. S. E. C. (C. C. A. 2, memorandum opinion, dated December 10, 1942); N. L. R. B. v. Friedman-Harry Marks Clothing Co., 83 F. (2d) 713 (C. C. A. 2); Hicks v. N. L. R. B., 100 F. (2d) 804 (C. C. A. 4); *cf.* Standolind Oil & Gas Co. v. N. L. R. B., 116 F. (2d) 274 (C. C. A. 5); Standard Oil Co. v. N. L. R. B., 114 F. (2d) 743 (C. C. A. 8).

consumers other than petitioners' members." The short answer is that petitioner, in its reply brief, argued at length that the Sanders case sustains its standing to maintain this review action. Moreover, the language used in petitioner's original brief cannot, we think, be given the interpretation ascribed to it by respondents. And even if it could, it would, at most, constitute a mistaken concession, not as to any facts, but merely as to a legal argument which we may and do ignore in a motion directed solely to the question of this court's jurisdiction, since, as a matter of "law," the petition and the undisputed facts show that petitioner has a "standing," under the statute, to vindicate the public interest.[38]

69 11. Respondents seek to distinguish the Sanders and Scripps-Howard cases by an argument to which we have already briefly adverted and which, stated more in detail, runs as follows:

(a) Section 2 (b) of the Act[39] provides for the appointment of a public officer, the Bituminous Coal Consumers' Counsel who, to quote that section, is to "appear in the interest of the consuming public in any proceeding before the Commission." (b) Although there is no specific provision giving Consumers' Counsel the authority to seek review of a Commission's order under § 6 (b), yet, respondents assert, he clearly has such authority. This authority derives, say respondents, not at all from the fact that Consumers' Counsel was a party to the Commission proceedings; such a position respondents shun, for it would compel the conclusion that petitioner, as also a party to those administrative proceedings, would also be entitled to a review. Respondents find the sole basis of the authority of Consumers' Counsel to seek review under § 6 (b) in the fact that, being designated by § 2 (b) to represent the Consumers' interest in "any proceeding before the Commission," he is necessarily, by clear implication, say respondents, a "person aggrieved," for purposes of court review within the meaning of § 6 (b). (c) Although, then, according to respondents, the mere fact of representation of consumers' interests before the Commission necessarily, by clear implication, constitutes Consumers' Counsel a "person aggrieved," and therefore one entitled to court review, yet petitioner, although it also represented many consumers before the Commission, may not seek review as, similarly by implication, a "person aggrieved," be-

[38] The situation is not like that which confronted us in Cover v. Schwartz, — F. (2d) —, where a patentee, on his appeal in this court from a judgment adverse to him, advised us that he was satisfied from the facts brought out on the trial in the lower court that appellee had not infringed his patent, and therefore abandoned the infringement issue, so that it appeared factually that there was no justiciable controversy before us.

[39] See also § 22.

cause, say respondents, Consumers' Counsel has the exclu-
70 sive authority, under § 6 (b), to represent all consumers in court. (d) Where, then, as here, the Consumers' Counsel has not seen fit to seek court review, respondents maintain that no consumer can have a day in court.[40]

In the light of the obvious Congressional intent to protect the consumers' interests under this Act, we can well understand respondents' eagerness to show that someone—Consumers' Counsel—can seek court review on behalf of consumers. But, although respondents are represented here by unusually able lawyers, they advance an awkward argument for shutting out of court every actual consumer (and all representatives selected by actual consumers) and for confining efforts to obtain court relief for consumers to such activities as the official Consumers' Counsel, in his sole and unregulated discretion, may choose to undertake. For respondents' argument includes an admission—more, a contention—that it is merely the representation by Consumers' Counsel of the consumers' interests, which, by implication, makes him a "person aggrieved." Consequently, if the Act does not constitute him the exclusive consumers' representative, respondent's own argument leaves no escape from the conclusion that anyone possessing or representing a consumer's interest, is a "person aggrieved," and, accordingly, if he was a party to the Commission proceedings, entitled to seek court review. Respondents' argument, then, is bottomed entirely on their assertion that Consumers' Counsel is the sole representative of consumers. The Act admittedly nowhere so provides, so that the alleged exclusive nature of that representation rests, as we have seen, on implication.

If, however, there is such an implication of such exclusive
71 representation, it should be peculiarly applicable to a "proceeding before the Commission," since it is as to such proceedings, and those alone, that the Act—2 (b)—explicitly provides for representation by Consumers' Counsel of "the interest of the consuming public." Yet the Commission has itself administratively interpreted the act to mean that the Consumers' Counsel is not the exclusive representative even of private consumers, in a "proceeding before the Commission"; for the Commission, as above noted, permitted the petitioner, as a representative of such consumers, to become a party to the proceedings before it. This permission was granted pursuant to Commission practice rules,[41]

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[40] Not even States and Cities which, under §§ 4 II (d) and 4 II (j), are "governmental consumer" of a kind that, as respondents admit, Consumers' Counsel does not represent in proceedings "before the Commission."

[41] Under the heading of "Parties" the Rules of Practice state: "The parties to proceedings before the Commission are classified as complainants, applicants, consumers' counsel, petitioners, defendants, intervenors, protestants and respondents, according to the nature of the proceedings and their relation thereto." Under the heading of "Protestants," the rules provide: "Persons other than the consumers' counsel objecting on the ground of personal or public interest to any action which the

authorized by the provisions of § 2 (a) which provides, "*No order which is subject to judicial review under section 6* * * * shall be made by * * * by the Commission, unless * * * it has afforded to *interested parties* an opportunity to be
72 heard. * * *"[42] The Commission, by allowing petitioner to become a party, must be deemed to have found that petitioner came within the class of "interested parties." One of the respondents, as Director of the Division, in the proceedings below referred to contentions made by "two representatives of consumer interests, namely, Bituminous Coal Consumers' Counsel and Associated Industries of New York" (the petitioner here).[43] In the Monograph of the Attorney General's Committee on Administrative Procedure relating to the administration of this Act,[44] it is said, in referring to the hearings in General Docket 15 (which began May 15, 1938); "A vigorous dispute with Consumers' Counsel, who took the position that individual consumers could appear as such through their own representatives and were not limited to representation by his office, was settled for all practical purposes when the Commission decided as a matter of policy to permit such appearances; the legal question is still open." That the question is no longer open so far as respondents could close it, appears from the following: Before the Committee on Ways and Means of the House which, in 1941, was considering the extension of the Act for a two-year period, the then Director, asked whether "many consumers or their representatives" had appeared before the Commission, replied: "A great many appeared, and associations appeared, such as, for instance, the Associated Industries of New York, who have a great many members, and they are very active."[45] In the Second Annual Report of the Commission (covering the fiscal year 1938 and additional activities to November 15, 1938), in referring to enforcement of regulations, it was said (p. 4): "On the other hand, it is clear that such powers
73 of enforcement must be accompanied by safeguards that will protect the rights of individual producers and the interests of the consuming public. This means that the entire procedure

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Commission is authorized to take under proceedings before it, are styled 'protestants.'" Other sections of the Rules provide: "Protestants must set forth the position and interest of the protestant in the proceeding * * * Anyone entitled under the Act to complain to the Commission and having an interest in any pending procedure may petition to intervene therein * * * and such petition may be granted in the discretion of the Commission * * * Petitions for intervention must set forth * * * the position and interest of the petitioner in the proceeding * * * If leave is granted, the petitioner thereby becomes an intervenor and a party to the proceeding * * * None other than a party who has become such in conformity with these rules will be heard * * * Notice shall be served upon all parties to the proceeding, including the consumers' counsel, state or other governmental authorities having official interest in the proceedings, and such other persons as may be deemed to have a substantial interest therein."

[42] Italics added.

[43] See also the other facts summarized at the beginning of this opinion.

[44] 77th Cong., 1st Sess., Sen. Doc. No. 10, Pt. 10, page 12.

[45] Printed Hearings, p. 603.

of establishing minimum prices must be so conducted as to *afford any interested* producer or *consumer an opportunity to lay his grievances before the Commission* * * *" [46]

Accordingly, respondents, by their own administrative interpretation, have held that the Act does not, by implication, vest in the Consumers' Counsel the sole authority to represent all consumers in a "proceeding before the Commission," [47] which will lead to an "order which is subject to review under § 6" [48] i. e., subject to court review on petition of "any person aggrieved by an order issued by the Commission in a proceeding to which such a person is a party." [49] And we see no good reason (nor do respondents suggest any) for reading such an implication into § 6 (b) while, at the same time, refusing to read it into § 2 (a). The phrase "person aggrieved" no more calls for such an implied interpretation than does the phrase "interested persons." To put it differently, if petitioner is, as the Commission in effect found, included in the category of "interested persons," it is difficult to perceive why petitioner is not a "person aggrieved." [50]

74 We have been told that we must accord very great weight to administrative interpretations by these respondents of the provisions of this very Act. Gray v. Powell, 314 U. S. 402, 411–413. We might reject such an administrative interpretation if it were plainly contradicted by explicit statutory provisions or utterly inconsistent with the demonstrated intention of Congress manifested in the legislative history of the Act. Cf, the Estate of Sanford v. Commissioner, 308 U. S. 39, 52; United States v. San Francisco, 310 U. S. 16, 31, 32. But that is not this case. [51]

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[46] The sentence continued: "and, having exhausted other avenues of relief, to appeal his case to the courts." We give no weight to that particular part of the statement since the interpretation of the Act with reference to court action is not within the scope of administrative interpretation. It is, however, of interest. See footnote 17, supra.

[47] § 2 (b).

[48] § 2 (a).

[49] § 6 (b).

[50] Respondents' arguments would lead to a curious result. They say that Consumers' Counsel did not raise the legal objections in the proceedings below which petitioner did there raise and reiterates here; and they indicate that, if Consumers' Counsel had sought review, he could not have raised those objections. If that argument were sound (a matter we do not decide) it would mean that, if the Consumers' Counsel exclusively represented consumers in court, the consumers would never have a day in court to urge what may be solid objections to the invalidity of the orders, since, although other consumers' representatives were permitted to and did voice those objections in the administrative proceedings, they could not be asserted in a court review because not urged by Consumers' Counsel in the administrative proceedings.

[51] Respondents refer to a statement made by a witness in the House Committee hearing that he understood the statute to mean that a consumer could not, as of right, *institute* a complaint before the Commission against the price of coal, and that a municipality alone could petition the Commission "on behalf of the consumers"; and respondents intimate that one Congressman, a member of the Committee, agreed with that statement. Such data, at best, is not the kind of legislative history which is persuasive in construing the statute.

Respondents also refer to the House Committee Report recommending the re-establishment of Consumers' Counsel as an independent agency in which it was said that the purpose was that "of insuring an alert and vigorous representation *with consumers* throughout the country, large and small alike * * *" House Report 3240, H. R. 4146, 77th Cong., 1 Sess. (1941), p. 8; emphasis added. This language is far from indicating an intention to make Consumers' Counsel the sole spokesman for private consumers. On the contrary, it is far more consistent with the position taken by Consumers' Counsel noted supra that he was not their sole spokesman even before the Commission.

Here we have a "contemporaneous construction of a statute by the men charged with responsibility of setting its machinery in motion, of making the parts work, efficiently and smoothly,
75 while they are yet untried and new." United States v. American Trucking Association, 310 U. S. 534, 549. Since it is in no sense unreasonable, we must accept respondents' interpretation of "interested persons" in § 2 (a). Cf. Morgan Stanley & Co. v. S. E. C., 126 F. (2d) 325 (C. C. A. 2). It is true, as respondents contend, that the interpretation of § 6 (b)—the court review section—is not within the scope of the Commission's administrative powers and that their interpretation of that section need not concern us. But, if we accept, as we must, the Commission's interpretation of § 2 (a) and 2 (b)—which are within that administrative scope—as giving to Consumers' Counsel no exclusive authority to represent all consumers in proceedings before the Commission, we cannot consistently interpret § 6 (b) so as to give him such an exclusive authority for purposes of court review.

Respondents point to a provision in the Act [82] specifically conferring the right to what respondents call "administrative remedies" before the Commission upon "any State or political subdivision of a state." Respondents say that such governmental agencies in their capacity as "governmental consumers" have a statutory right to those remedies, whereas governmental "nonconsumers," since they are not specifically mentioned in the Act, have no "legal right" even to those "administrative remedies" and, a fortiori, no right to relief in court.[83] But, as above
76 noted under § 2 (a), the Commission must grant a hearing in its own reviewable proceedings to "interested persons," and, as respondents and Consumers' Counsel have construed that provision, it is not limited to "governmental" consumers, but includes also "nongovernmental" consumers and their representatives—such as petitioner. We regard that construction as not at all unreasonable and therefore one which we must accept.

Summarizing respondents' position, in effect they are saying: "In our own proceedings, when they were of such a nature as to be

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[82] §§ 4 II (d) and 4 II (j).

[83] As noted above, respondents insist that City of Atlanta v. Ickes, supra—which held that a city as a consumer has no "standing" to maintain a suit against respondents in the District Court—is completely applicable to court review under § 6 (b). This compels respondents to argue, as they do, that cities and states, although admittedly authorized by specific provisions of the Act to protect their consumer interests by appearing as parties in a Commission proceeding, are precluded from obtaining court review under § 6 (b), because, say respondents, the representation of consumer interests in court is vested by the Act solely in consumers' counsel. The awkwardness of respondents' position thus becomes even more clear: The only basis for their contention that Consumers' Counsel has such exclusive authority in court is the fact that, under § 2 (b), he is to appear for the "consuming public" in all proceedings "before the Commission"; if his authority to represent consumers in court derives solely from his authority to represent consumers "before the Commission," then it is impossible to see why states and cities, also specifically authorized to represent themselves as consumers before the Commission, have not a similar authority to represent themselves in court under § 6 (b). But, if they do have that authority, then (aside from reasons already canvassed) it follows that City of Atlanta v. Ickes has no bearing on a review proceeding under § 6 (b).

reviewable by the courts, we have construed the Act to mean that Consumers' Counsel—who has no express statutory authority to appear for consumers except in proceedings before us—is not the only representative of private 'nongovernmental' consumers, but that, notwithstanding Consumers' Counsel's appearance in such proceedings, petitioner could also participate as a party representing private consumers, being an 'interested person' under § 2 (a). Nevertheless, we now ask the court to construe § 6 (b), relating to court actions, to mean that Consumers' Counsel—who is not mentioned in § 6 (b)—is the sole representative in court of all consumers and, accordingly, to hold that petitioner must be excluded from appearing in court for any consumers." We believe that to be an untenable position.

In the Chicago Junction case, 264 U. S. 258, 267, certain railroads had been permitted by the Interstate Commerce
77 Commission to become parties to a proceeding before it. They then brought suit to set aside the resultant Commission order. The applicable statute (now Title 28, § 45a) provided that "*any party * * * in interest to the proceeding before the Commission*" terminating in a Commission order, may "*intervene*" [54] in "any suit wherein is involved the validity of such" order. The Supreme Court held that the fact that permission had been given by the Commission to the plaintiff railroads to become parties to the administrative proceedings gave them the right not merely to "*intervene*" in a court suit brought by someone else but also themselves to *institute* such a suit. The court said that that permission by the Commission "implies a finding by the Commission that plaintiffs have an interest," because leave to become parties "can be granted" by the Commission "only to one showing an interest." When, however, the question again arose in Sprunt & Sons v. U. S., 281 U. S. 249, 255, and Pittsburg & W. Va. Ry. Co. v. U. S., 281 U. S. 479, 486, 488, the court held that the statute, which is now construed as referring merely to *intervention* in a court suit, did not mean that a person permitted to become a party to the Commission proceeding could maintain "an *independent suit*" in court, assailing the Commission's order. But the Supreme Court clearly indicated that, if the plaintiffs had sought merely to "intervene" in a court suit instituted by another and proper person, the ruling would have been otherwise. In the later case of I. C. C. v. Oregon-Wash. R. & N. Co., 288 U. S. 14, persons who had been permitted to become parties to the Commission proceedings did not institute but "intervened" in a court suit involving the Commission's order; the Supreme Court held that they were entitled to appeal from the decision of

[54] Italics added.

the trial court under a section of the same statute which
78 authorized an appeal to the Supreme Court by "an aggrieved party." The instant case resembles the Oregon-Washington case and not the Sprunt and Pittsburg & W. Va. cases for here, under § 6 (b), a party to the administrative proceeding, if "aggrieved," is entitled himself to institute a review action and is not limited to "intervention" in such an action brought by someone else.[55]

Provisions in some of the many statutes, relating to administrative agencies, permit court review by a "person aggrieved" [56] and do not also require, as does § 6 (b) here,[57] that he must have been a party to the administrative proceeding. The plain purpose of that additional requirement in § 6 (b) here is to preclude review by one who, although "aggrieved," has not first presented objections to the Commission; we think its purpose is not, as respondents suggest, to set up two different tests—one for the interest needed to become a party to the administrative proceeding and another for the interest needed to obtain court review.

We are not, however, to be taken as saying that there might not be a case where, by a blunder, the Commission had permitted a person to become a party to its own proceeding who, as the record facts showed, was unquestionably not an "interested
79 person"; in such event it might be true that such a person could not be treated as a "person aggrieved" under § 6 (b). But that question is not now before us.

12. It is urged by respondents that, even if a consumer is a "person aggrieved," nevertheless the petition should be dismissed because there is nothing in the record below, and only a bare allegation in the petition here, showing that petitioner is itself a consumer. But petitioner is a membership corporation "formed for the promotion of the welfare of its members"; and respondents concede in their brief that, for the purpose of this motion, petitioner's membership consists of 1,356 persons, firms, and corporations, including many who "purchase and consume substantial quantities (estimated at 15,000,000 tons for the year 1942) of bituminous coal produced in Minimum Price Area 1 * * * and which is shipped for sale and sold in Market Areas 2 and

[55] In Alton R. Co. v. U. S., 315 U. S. 15, 19, the applicable statute provided that suit to enjoin certain acts authorized by the I. C. C. might, in the first instance, be brought by "any party in interest." The court held that, on the facts, the complainant there came within the "party in interest" provision, saying: "We do not stop to inquire what effect, if any, the status of appellant railroad companies as intervenors before the Commission had on their right to bring and maintain this suit. Cf. Chicago Junction case, 264 U. S. 258 with Pittsburg & West V. Ry. Co. v. U. S. 281 U. S. 479."

[56] See, e. g., as to the S. E. C., Title 15, § 79x; as to the F. C. C., Title 47, § 402 (b) (2).

[57] For a statute relating to the S. E. C., which, like § 6 (b) here, provides that the "aggrieved" person must have been a party to the Commission's proceedings, see Title 15, § 78y.

4"; [57a] and (again for purposes of this motion) respondents concede that those members may well be affected by the respondents' orders which increase the minimum prices at which coal can be sold by code member producers in an area in which those of petitioner's members who are coal purchasers transact their business. Respondents, as already noted, permitted petitioner to become a party to proceedings before them on the basis that petitioner did represent consumers, and with evidence in the record of petitioner's membership; and respondents, in those proceedings referred to petitioner as a representative of consumers. We take that as an administrative finding by respondents that petitioner is vested with sufficient authority to represent its consumer members. Consequently, we do not regard as in point cases [58] suggesting
80 that, ordinarily, there may be doubt whether a membership organization can be permitted to sue on behalf of its members, absent specific authority to do so.

13. In Saxton Coal Mining Co. v. National Bituminous Coal Commission, 96 F. (2d) 517 (App. D. C.), the court, although acting only pendente lite, reached a conclusion similar to ours. There consumers filed a petition under § 6 (b) to review price-fixing orders of the Commission, made in 1938 (and not in issue here), alleged to be invalid because, inter alia, it was charged that they were made without findings of fact. Pending a hearing on the merits, the court stayed the Commission's orders.[59] While the report of the case does not so show, respondents admit that on a separate petition, under § 6 (b), filed by the then Consumers' Counsel and by petitioner here and some of its members, the court granted a similar stay enjoining the Commission from enforcing its orders "in so far as they fix or establish minimum prices for coals of code members for sale to said members of Associated Industries of New York State, Inc." [60] Since the order of the court was not on the merits, it cannot be said to be res judicata. However, we note the case because it is persuasive here, as to petitioner's "standing."

14. Of course, nothing we have said in this opinion is to be taken as indicating in any way that, when we consider this case on the merits, we will find any invalidity in respondents' order; and
81 of course, too, our review will be limited to ascertaining

[57a] New York State is in Market Areas 2 and 4.

[58] Moffat Tunnel League v. United tSates, 289 U. S. 113, 119; In re Engelhard, 231 U. S. 646, 651.

But see A. F. of L. v. N. L. R. B., 103 F. (2d) 933 (App. D. C.) aff'd 308 U. S. 401.

[59] The court said: "Without prejudice to an ultimate ruling on the subject, we think it cannot be said at this stage of the proceedings that the consumer railroads are so clearly not aggrieved persons within the Act as to have no statutory foundation for judicial review and as thus not to be entitled to pendente lite relief."

[60] Counsel for the respondents advises us that the respondents as successors of the Commission subsequently rescinded the orders under review and the court then dismissed the petitions.

whether respondents have committed any errors of "law," and will be very narrow in scope.[81]

The motion is denied.

82 In United States Circuit Court of Appeals
[Title omitted.]

Order denying motion

(Filed Feb. 8, 1943)

A motion having been made herein by counsel for the respondents to dismiss the petition for lack of jurisdiction,

Upon consideration thereof it is ordered that said motion be and hereby is denied.

D. E. ROBERTS, *Clerk.*

83 [File endorsement omitted.]

84 In United States Circuit Court of Appeals for the Second Circuit

Notice of settlement of order

[Title omitted.]

SIRS. Please take notice that the annexed order will be presented on March 2, 1943, at 2 o'clock in the afternoon, for settlement and signature at the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, New York.

Dated New York, N. Y., February 24, 1943.

LE BOEUF & LAMB,
Attorneys for Petitioner,
15 Broad Street, New York, New York.

To:

Hon. WARNER W. GARDINER,
Solicitor, United States Department of the Interior,
Attorney for Respondent Harold L. Ickes.

Hon. ARNOLD LEVY,
General Counsel, Bituminous Coal Division,
U. S. Department of the Interior,
Attorney for Respondent Dan H. Wheeler.

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[81] Cf. Gray v. Powell, supra; Sperry Gyroscope Co. v. N. L. R. B., 129 F. (2d) 922, 942 (C. C. A. 2); Morgan Stanley & Co. v. S. E. C., 126 F. (2d) 325, 332 333; Perkins v. Endicott Johnson Corp., 128 F. (2d) 208, 220–223 (C. C. A. 2) aff'd Endicott Johnson Corp. v. Perkins. — U. S. — (January 11, 1943).

85 United States Circuit Court of Appeals for the Second Circuit

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC., PETITIONER

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND DAN H. WHEELER, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, RESPONDENTS

Order denying respondents' motion to dismiss petition

Before SWAN, AUGUSTUS N. HAND, and FRANK, Circuit Judges.

This cause came on for hearing on Respondents' motion to dismiss the petition herein for lack of jurisdiction, and the Court having heard the argument of counsel, on filing the opinion of the court,

It is ordered that the said motion be and it hereby is denied.

Dated Mar. 3, 1943.

THOMAS W. SWAN,
AUGUSTUS N. HAND,
JEROME N. FRANK,
U. S. C., JJ.

87 [Clerk's certificate to foregoing paper omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1943

Supreme Court of the United States

Order allowing certiorari.

(*Filed June 14, 1943*)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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OCTOBER TERM, 1942

No. 1010

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND DAN H. WHEELER, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, PETITIONERS

v.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Harold L. Ickes, Secretary of the Interior, and Dan H. Wheeler, Director of the Bituminous Coal Division of the Department of the Interior, prays that a writ of certiorari be issued to review an order of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on March 3, 1943, denying a motion to dismiss for lack of jurisdiction a petition for review of orders of the Secretary of the Interior and the Director of the Bituminous Coal Division estab-

lishing certain revised minimum prices for the sale of bituminous coal.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 36–59) has not yet been reported.

JURISDICTION

The order of the Circuit Court of Appeals was entered on March 3, 1943 (R. 60). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 12, 1925.

QUESTION PRESENTED

An order of the Director of the Bituminous Coal Division, affirmed by the Secretary of the Interior, revised certain minimum prices applicable to the sale of bituminous coal. Respondent, a membership corporation of New York, some of whose members purchase bituminous coal, filed a petition in the court below for review of the orders, and petitioners moved to dismiss. The question is whether the respondent has legal capacity and standing to maintain a suit under Section 6 (b) of the Bituminous Coal Act of 1937.

STATUTE INVOLVED

Section 6 (b) of the Bituminous Coal Act of 1937 (Act of April 26, 1937, c. 127, 50 Stat. 72–90, 15 U. S. C., Sec. 828, *et seq.*, as extended by

amendment April 11, 1941, 55 Stat. 134, 15 U. S. C., Supp. I, Sec. 849, and amendment of April 24, 1943, P. L. 40, 78th Cong., 1st sess., c. 68, H. J. Res. 113) provides:

> Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission[1] be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court

[1] The administration of the Act was transferred from the National Bituminous Coal Commission to the Department of the Interior by Act of June 7, 1939, Reorganization Plan No. II, Section 4 (a) and (b), Pub. Res. No. 20, 53 Stat. 813, 1431, 5 U. S. C., Sec. 133 (pursuant to authority granted in the Reorganization Act of 1939 (Pub. No. 19, 76th Cong., 1st Sess., approved April 3, 1939, 53 Stat. 561, 5 U. S. C., Sec. 133, *et seq.*)). Pursuant to order of the Secretary of the Interior, the Bituminous Coal Division is, with exceptions not here pertinent, the successor to all of the functions of the National Bituminous Coal Commission (Order No. 1399 of the Secretary of the Interior, dated July 5, 1939).

> shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. * * *

Other pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 19–22.

STATEMENT

On May 15, 1938, the National Bituminous Coal Commission instituted a proceeding, designated General Docket No. 15, to carry out the provisions of the Act calling for the establishment of minimum prices for the sale or other disposal of bituminous coal throughout the country. After extensive proceedings before the Commission, the successor Bituminous Coal Division and the Secretary of the Interior, minimum prices finally became effective October 1, 1940 (R. 7–8, 36–37).

On May 2, 1941, a proceeding designated General Docket No. 21 was begun by the Division to determine the nature and extent of changes in the cost of production of coal since such costs had been calculated in General Docket No. 15, and to adjust applicable minimum prices in the light of changes found to have occurred (R. 9–10, 37). As the culmination of that proceeding, by Order dated August 28, 1942, the Director of the Division established revised minimum prices including prices for coal produced in Minimum Price Area 1 for ship-

ment into Market Areas 2 and 4.[2] After review of certain questions of law and policy, the Secretary of the Interior, by order dated September 30, 1942, affirmed the Director's action to the extent reviewed. Pursuant to these two orders, revised minimum prices went into effect October 1, 1942. (R. 37–38.)

On October 27, 1942, respondent Associated Industries of New York, Inc., filed a petition in the court below, under Section 6 (b) of the Act, for review of these orders. The petition alleged that respondent is "a membership corporation organized and existing under the laws of the State of New York"; that its membership consists of 1,356 persons, firms and corporations engaged in commerce or industry in the State of New York; and that its members "purchase and consume substantial quantities (estimated to be approximately 15,000,000 tons for the year 1942) of bituminous coal" produced in Minimum Price Area 1 and shipped and sold in Market Areas 2 and 4 (R. 1). The petition further recited that the contested orders were made as the result of a proceeding held before the Division "to which petitioner was a party" and that petitioner "is aggrieved" by the orders (R. 2). The petition did not allege that respondent is a producer, purchaser, or consumer of coal but did recite that the orders are prejudicial "in

[2] A table of minimum price areas is set out in Section 4 II (a) of the Act. Numbered common consuming market areas were established by the Commission pursuant to Section 4 II (b) of the Act.

that they require petitioner and its members to purchase and pay for bituminous coal produced in Minimum Price Area 1 at increased minimum prices and at prices related to such increased minimum prices which have not been determined according to law" (R. 14).

Petitioners moved to dismiss the proceeding on the ground that respondent was not a "person aggrieved" by the orders within the meaning of Section 6 (b) of the Act and lacked standing to maintain a petition for review, and that the court was without jurisdiction (R. 34–35). The motion was denied by the court below March 3, 1941, on the basis of an elaborate opinion filed February 8, 1943.

REASONS FOR GRANTING THE WRIT

1. The decision below raises questions of substantial public importance which should be decided by this Court.[3]

Whether buyers of bituminous coal may institute and participate in administrative and judicial proceedings under the Bituminous Coal Act, inde-

[3] The decision of the court below was made on a motion to dismiss filed as an accommodation to opposing counsel, before certification or printing of a 10,000 page record. Should the position of the Government ultimately be sustained on the merits, consideration by this Court of the important questions here presented might be foreclosed. Cf. *Land O' Lakes Creameries* v. *McNutt*, 132 F. (2d) 653 (C. C. A. 8). In such circumstances, the Court should in its discretion allow the writ of certiorari to review the order before final judgment below. See, *e. g.*, *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 158–159.

pendent of the Office of Bituminous Coal Consumers' Counsel, has been a problem of persistent concern ever since the passage of the Act. In 1938, in *Saxton Coal Mining Co.* v. *National Bituminous Coal Commission,* 96 F. (2d) 517, the Court of Appeals for the District of Columbia granted injunctive relief, *pendente lite* and "without prejudice to an ultimate ruling on the subject," to certain nongovernmental consumers against minimum prices established by the Commission without notice, hearing, or findings of fact. In *City of Atlanta* v. *Ickes,* 308 U. S. 517, this Court held that a municipality which was a consumer of bituminous coal lacked standing to maintain a suit to enjoin the establishment of minimum prices and to secure a declaration that the Act was unconstitutional. In 1941, at the legislative hearings on the extension of the Act, it was asserted and apparently assumed that nongovernmental consumers, independent of the Office of Bituminous Coal Consumers' Counsel, were precluded from initiating proceedings before the Division seeking establishment or alteration of minimum prices,[4] as well as from maintaining a petition for judicial review of the Division's price orders.[5]

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[4] Testimony of John Carson, who for some time served as consumers' counsel and who appeared as representative of the Cooperative League of America, Hearings before House Committee on Ways and Means, H. J. Res. 101, 77th Cong., 1st Sess., 129, 152.

[5] Testimony of John J. Connaughton, counsel for the National Association of Hot House Vegetable Growers, Hearings

The present case is in substance a sequel to the *City of Atlanta* case, *supra*. The court below, in holding the principles declared in the *City of Atlanta* case inapplicable to a proceeding for review under Section 6 (b) of the Act, has subjected minimum price-fixing action to judicial review at the instance of tens of thousands of actual or potential private purchasers or consumers of bituminous coal,[6] irrespective of traditional principles of "standing to sue," and independent of the Office of the Bituminous Coal Consumers' Counsel, the agency specifically created by Congress for the articulation of the interests of the consuming public. Cf. *L. Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295, 307.

The court below holds that the phrase "any person aggrieved" in Section 6 (b) indicates a congressional intention to enlarge the class of persons permitted to seek review to include purchasers as to whom the effect of a minimum price-

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before House Committee on Ways and Means, H. J. Res. 101, 77th Cong., 1st Sess., 557, 563. The hearings do not reveal that any member of the House Committee dissented from the witness' interpretation of the Act; his proposal that the Act be amended to permit consumers to sue under Section 6 (b) went unheeded.

[6] General Docket No. 21, in which the orders challenged by respondent were entered, revised in excess of 100,000 individual bituminous coal prices throughout the country. On review of such orders, there may be as many distinct issues as there are litigating consumers, irrespective of whether the issues are raised in separate or consolidated dockets.

fixing order is *damnum absque injuria.* The same or similar language is found in many other federal statutes.[7] The decision below would seem, then, to compel a similar revision of principles limiting the persons who had "standing to review" the administrative action under those other statutes.

We believe that whether the decision below is right or wrong, the issues which it raises require resolution by this Court. We shall, however, suggest some of the respects in which we believe the court below to have erred.

2. The decision below misconceives and misapplies the standards for determining the right

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[7] In addition to the provisions of the Communications Act discussed in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, see National Labor Relations Act, 49 Stat. 455, sec. 10 (f), 29 U. S. C., sec. 160 (f); Securities Act of 1933, 48 Stat. 80, sec. 9 (a), 15 U. S. C., sec. 77i; Trust Indenture Act (1939), 53 Stat. 1175, sec. 322 (a), 15 U. S. C., sec. 77vvv (a); Securities Exchange Act, 48 Stat. 901, sec. 25 (a), 15 U. S. C., sec. 78y (a); Public Utility Holidng Company Act, 49 Stat. 834, sec. 24 (a), 15 U. S. C., sec. 79x (a); Investment Companies Act (1940), 54 Stat. 844, sec. 43 (a), 15 U. S. C., sec. 80a–42 (a); Investment Advisers Act (1940), 54 Stat. 855, sec. 213 (a), 15 U. S. C., sec. 80b–13 (a); Fair Labor Standards Act, 52 Stat. 1065, sec. 10 (a), 29 U. S. C., sec. 210 (a); Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1055, sec. 701 (f), 21 U. S. C., sec. 371 (f) (1); Civil Aeronautics Act of 1938, 52 Stat. 1024, sec. 1006 (a), 49 U. S. C., sec. 646 (a); Railroad Retirement Act of 1937, 50 Stat. 315, sec. 11, 45 U. S. C., sec. 228k; Natural Gas Act, 52 Stat. 831, sec. 19 (b), 15 U. S. C. 717r (b); and Federal Power Act, 49 Stat. 860, sec. 213 (b), 16 U. S. C., sec. 825l (b).

of a "person aggrieved" to maintain petitions for judicial review of administrative action pursuant to the Bituminous Coal Act of 1937.

Under traditional principles of common law and equity, and in the absence of express statutory provisions to the contrary, a purchaser of commodities or services has no right to challenge in the courts administrative action which may tend to increase the price he is required to pay for such commodities or services in the market.[8] Any financial injury which such a purchaser may sustain, like financial injury arising out of competition,[9] is *damnum absque injuria.*

The court below held, however, that Congress repudiated normal principles of "standing to sue" in Section 6 (b) of the Act by authorizing "any person aggrieved by an order issued" by the Bituminous Coal Division "in a proceeding in which such person is a party" to obtain review of

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[8] See *United States Light & Heat Corporation* v. *Niagara Falls Gas & Electric Light Co.*, 47 F. (2d) 567 (C. C. A. 2), certiorari denied, 283 U. S. 864; *City of New York* v. *New York Telephone Company*, 261 U S. 312, 316; *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 592; *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249; *Edward Hines Trustees* v. *United States*, 263 U. S. 143; *United States* v. *Merchants & Manufacturers Traffic Ass'n*, 242 U. S. 178. See also *In re Engelhard & Sons Company*, 231 U. S. 646, 651; *Williams* v. *Riley*, 280 U. S. 78.

[9] *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, 142; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478–479; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 548.

the order in an appropriate Circuit Court of Appeals. It rested on the doctrine announced by this Court in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 477.

In our view, the right of a private purchaser of bituminous coal to maintain a petition for review of a minimum price-fixing order issued under the Bituminous Coal Act of 1937 is not to be measured by principles announced in the *Sanders* case, even if they should reach so far as to permit anyone threatened with financial loss to vindicate the public interest under the Communications Act. In the *Sanders* case this Court held that a competing radio station financially, though not legally, injured by the grant of a license to a rival station could challenge the order of the Federal Communications Commission by appeal as a "person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing" a license. The Act elsewhere expressly gave the right to appeal to one whose application for a license was denied. The Court concluded that if a competitor injured by the grant of another's application had no legal standing to appeal from the granting of a license, the provision dealing with persons "aggrieved" would be deprived "of any substantial effect." In contrast, the language of Section 6 (b) of the Bituminous Coal Act of 1937, covering all appeals, has substantial

meaning when interpreted as providing judicial review for those persons, and only those, possessing rights which the law customarily recognizes and protects. For example, a producer who is a member of the Bituminous Coal Code and who is prohibited from selling coal at less than the prices fixed by an order of the Division would clearly be a "person aggrieved" by the order. See *Utah Fuel Co.* v. *National Bituminous Coal Commission,* 306 U. S. 56; *Gray* v. *Powell,* 314 U. S. 402. *Cf.* page 16, note 14, *infra.*

Further, unlike the competitor in the *Sanders* case, a private purchaser of coal is not the only representative of the general consuming public "having a sufficient interest to bring to the attention of the appellate court errors of law" allegedly committed by the Division in the court of its proceedings. Cf. 309 U. S. 470, 477. For Congress in the Bituminous Coal Act of 1937, in addition to enjoining the Division with the responsibility of establishing minimum prices with "due regard to the interests of the consuming public,[10] created an independent agency, now known as the Office of

[10] Sections 4 II (a) and 4 II (b). See also Section 4 II (c) which authorizes the Division "in the public interest" to establish "maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor * * *." Even when "channeled through" a public agency having such responsibilities in a particular field, the interests of the public have been held to be "amply protected." *L. Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295, 308; *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 592.

Bituminous Coal Consumers' Counsel,[11] expressly "to appear in the interest of the consuming public" in any proceeding before the Division and to conduct independent investigations necessary to enable proper representation of the consumer in such proceeding. Sec. 2 (b) (2). Consumers' Counsel, together with "any State or political subdivision of a State" and other enumerated persons, is specifically authorized to institute various types of proceedings before the Division. Sec. 5 (b). If dissatisfied with the administrative action, he may appeal.

In view of the meticulous distinction which the statute recurrently makes between private consumers and consumers which are states or political subdivision of states or whose interests are asserted by Consumers' Counsel, it should not be assumed, as did the court below, that a private consumer, not even authorized to institute a proceeding before the administrative agency, was

[11] Under Reorganization Plan No. II, Section 4 (c), transmitted May 9, 1939, pursuant to the Reorganization Act of 1939, the functions of Consumers' Counsel of the National Bituminous Coal Commission were transferred to the Office of the Solicitor of the Department of the Interior. By amendment to the Bituminous Coal Act, the Office of Bituminous Coal Consumers' Counsel was reconstituted as a separate and independent agency. Act of April 11, 1941, 53 Stat. 134. Section 22 (b) of the amended Act provides that "The counsel shall have and perform the functions conferred and imposed upon the Consumers' Counsel of the National Bituminous Coal Commission [Coal Division] by this Act as in force upon its enactment * * *."

intended by Congress to institute proceedings for review in the federal courts.

3. The court below concluded that because respondent was treated as "an interested party" within the meaning of Section 2 (a) and was allowed to participate, independent of Consumers' Counsel, in the administrative proceeding, it is accordingly a "person aggrieved" within the meaning of Section 6 (b) and entitled, independent of Consumers' Counsel, to maintain a petition for judicial review (R. 56–57).

This conclusion ignores, however, the substantial differences in scope and purpose between administrative and judicial proceedings. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141–144. Like many other administrative agencies charged with the formulation of policies and regulations of general applicability, the Division encourages persons in any way concerned with a proceeding to appear at its hearings and offer relevant evidence. No attempt is made to restrict participants to those who possess substantive legal rights, nor has it been assumed that permitting such a person to appear by formal intervention or otherwise represents either a determination that he has standing to challenge the proceeding in the courts or that his appearance vests him with a litigable interest which he would not otherwise

possess.[12] See *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 255, 257; *Pittsburgh & West Virginia Ry.* v. *United States*, 281 U. S. 479, 486; cf. *Alton R. Co.* v. *United States*, 315 U. S. 15, 19.

Further, the decision below ignores the fact that Section 6 (b) in express terms makes the appearance of a party in the administrative proceeding in which an order is entered, a separate and independent prerequisite to his filing a petition as a person aggrieved by the order. Fulfilment of this one condition cannot, without doing violence to the plain language of the Act, be deemed fulfilment of the other.[13]

4. In our view, neither the *Sanders* case nor other applicable authorities justify the conclusion of the court below that respondent, as a membership corporation of New York, may assert the

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[12] Some agencies have so indicated by express regulation. See Regulations of the Civil Aeronautics Authority, 14 Code of Federal Regulations (1939 Supp.), § 285.4; Rules and Regulations of the Federal Communications Commission, 47 Code of Federal Regulations (1939 Supp.), § 1.102. See, also, the practice of the Federal Power Commission in *Public Service Gas Co.*, F. P. C. Docket No. 9–108; *North Dakota Consumers Gas Co.*, F. P. C. Docket No. 6–119.

[13] The opinion below suggests that the "plain purpose" of the requirement that an aggrieved person must also be a party to the administrative proceeding "is to preclude review by one who, although 'aggrieved' has not first presented objections" to the Division (R. 57). Such an interpretation renders redundant and unnecessary the express provisions also contained in Section 6 (b) that "No objection to the orders of the Commission [Division] shall be considered by the court unless such objections have been urged below."

rights of some of its constituent members who purchase or consume bituminous coal, and by reason of the economic interests of these members, maintain a petition for judicial review of minimum price-fixing orders as a champion of the public interest.

The petition for review does not allege that respondent, as a membership corporation, has in the past been a purchaser or consumer of bituminous coal or that it intends in the future to make purchases of coal which are or may be affected by the challenged orders; indeed, respondent admitted in the court below that it is not a coal purchaser. The petition (R. 1) alleges only that respondent's "members purchase and consume substantial quantities of bituminous coal" for the sale of which the challenged orders established minimum prices. It is also alleged (R. 14) that "the orders are prejudicial to petitioner [respondent] and its members in that they require petitioner and its members to purchase and pay for bituminous coal" at increased minimum prices.[14] The petition contains no allegations that respondent sues to vindicate the public interest or to assert any rights other than its own or those of its members, or that the members have authorized respondent to sue in their behalf. The

[14] Unlike the Emergency Price Control Act of 1942 (Act of January 30, 1942, Pub. No. 421, 77th Cong., 2d Sess., Sections 4 (a), 203 (a), and 204 (a)), the Bituminous Coal Act of 1937 does not impose any penalties or affirmative obligations on purchasers of commodities subject to price regulation.

petition did not allege that respondent or its members are actually purchasing coal at the bare minimum prices established by the challenged orders. Cf. *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 170.

This Court has held that one seeking to set aside an administrative order must allege in his complaint that he has "capacity to sue"—that he "has, or represents others having, a legal right or interest that will be injuriously affected by the order." *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119, 121.[15] Respondent has shown neither, although both are challenged by the motion to dismiss. Since respondent has failed to establish that the challenged orders cause it any economic injury and has failed to show that it is empowered to sue in behalf of any of its members who may conceivably be injured, respondent has failed to fulfil the essential prerequisite to the maintenance of a suit as a representative of the public interest. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470.

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[15] See also *In re Engelhard & Sons Company*, 231 U. S. 646, 652; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278; *Consolidated Gas Co.* v. *Newton*, 256 Fed. 238 (S. D. N. Y.), affirmed, 260 Fed. 1022 (C. C. A. 2); *Wholesale Grocers' Ass'n* v. *Federal Trade Commission*, 277 Fed. 657, 661 (C. C. A. 5); *John L. Walker Co.* v. *National Underwriters Co.*, 3 F. (2d) 102 (C. C. A. 7). Cf Rule 17 (a), Federal Rules of Civil Procedure; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 170.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States Department of the Interior.

ARNOLD LEVY,
General Counsel,
Bituminous Coal Division,
United States Department of the Interior.

MAY 1943.

APPENDIX

Bituminous Coal Act of 1937, Act of April 26, 1937, c. 127, 50 Stat. 72, 15 U. S. C. § 828, as extended by amendment April 11, 1941, 55 Stat. 134, 15 U. S. C. Supp. I § 849, and April 24, 1943, P. L. 40, 78th Cong., 1st sess. c. 68, H. J. Res. 113:

SEC. 22 (a). There is hereby established in the Executive branch of the Government an office to be known as the Office of the Bituminous Coal Consumers' Counsel. The office shall be in charge of a counsel to be appointed by the President, by and with the advice and consent of the Senate. The counsel shall have no financial interest, direct or indirect, in the mining, transportation, or sale of, or the manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the generation, transmission, or sale of hydroelectric power, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment * * *

SEC. 22 (b). The counsel shall have and perform the functions conferred and imposed upon the Consumers' Counsel of the National Bituminous Coal Commission by this Act as in force upon its enactment * * *

SEC. 2 (b) (2). It shall be the duty of the counsel to appear in the interest of the consuming public in any proceeding before the Commission and to conduct such independent investigation of matters rela-

tive to the coal industry and the administration of this Act as he may deem necessary to enable him properly to represent the consuming public in any proceeding before the Commission. In any such proceeding before the Commission, the counsel shall have the right to offer any relevant testimony and argument, oral or written, and to examine and cross-examine witnesses and parties to the proceeding, and shall have the right to have subpena or other process of the Commission issue in his behalf. Whenever the counsel finds that it is in the interest of the consuming public to have the Commission furnish any information at its command or conduct any investigation as to any matter within its authority, the counsel shall so certify to the Commission, specifying in the certificate the information or investigation desired. Thereupon the Commission shall promptly furnish to the counsel the information or promptly conduct the investigation and place the results thereof at the disposal of the counsel.

SEC. 2 (b) (4). The counsel shall annually make a full report of the activities of his office directly to the Congress.

SEC. 4 II (d). If any code member or district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) or (c) of part II of this section, he or it shall have the right, by petition, to make complaint to the Commission,

and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of part II of this section * * *

SEC. 4 II (j). The Commission shall have jurisdiction to hear and determine written complaints made by any code member, district board, or member thereof, State or political subdivision of a State, or the consumers' counsel, which charge any violation of the code specified in part II of this section * * *

SEC. 4–A. Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4 * * *

Sec. 5 (b). The membership of any such coal producer in such code and his right to an exemption from the taxes imposed by section 3 (b) of this Act, may be revoked by the Commission upon written

complaint by any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, after a hearing, with thirty days' written notice to the member, upon proof that such member has willfully violated any provision of the code or any regulation made thereunder; and in such a hearing any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, or any consumer or employee, and the Commissioner of Internal Revenue, shall be entitled to present evidence and be heard * * *

SEC. 15. Upon substantial complaint that coal prices are excessive, and oppressive of consumers, or that any district board, or producers' marketing agency, is operating against the public interest, or in violation of this Act, the Commission may hear such complaint, and its findings shall be made public; and the Commission shall make proper orders within the purview of this Act so as to correct such abuses. The Commission may institute proceedings under this section, and complaints may be made by any State or political subdivision of a State or by the consumers' counsel.

U. S. GOVERNMENT PRINTING OFFICE 1943

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 61

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND DAN H. WHEELER, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, PETITIONERS

v.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO REVERSE AND REMAND

The above-entitled cause presents the question whether respondent, a membership corporation of New York, some of whose members purchase bituminous coal, has legal capacity and standing to maintain a petition, under Section 6 (b) of the Bituminous Coal Act of 1937, for review of certain orders of the Secretary of the Interior and the Director of the Bituminous Coal Division

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which revised minimum prices applicable to the sale of bituminous coal. The court below, overruling a motion to dismiss, held that respondent was entitled to maintain its petition. Certiorari was granted on June 14, 1943.

The Bituminous Coal Act of 1937 (Act of April 26, 1937, c. 127, 50 Stat. 72, 15 U. S. C., Sec. 828, *et seq.*) as extended April 11, 1941, 55 Stat. 134, 15 U. S. C., Supp. I, Sec. 849 and amendment of April 24, 1943, P. L. 40, 78th Cong., 1st sess., c. 68, H. J. Res. 113 and amendment of May 21, 1943, P. L. 53, 78th Cong., 1st sess., c. 97, H. J. Res. 122, expired at 12:01 A. M. August 24, 1943. Minimum prices which had been established pursuant to the challenged orders became inoperative.

Accordingly, the Solicitor General, on behalf of Harold L. Ickes, Secretary of the Interior, moves the Court to reverse the order of the Circuit Court of Appeals for the Second Circuit entered March 3, 1943, and to remand the cause with directions to vacate its order and dismiss the cause for the reason that it has become moot by reason of the expiration of the Bituminous Coal Act of 1937. Compare *Brownlow* v. *Schwartz,* 261 U. S. 216, 218; *O'Ryan* v. *Mills Novelty Co.,* 292 U. S. 609.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1010 61

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, and DAN H. WHEELER, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR,

Petitioners,

v.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1010

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, and DAN H. WHEELER, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR,

Petitioners,

v.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 134 F. (2) 694.

Question Presented

The question presented on this petition for a writ of certiorari is whether the court below correctly held that under the provisions of Section 6(b) of the Bituminous

Coal Act of 1937, as amended (herein for convenience sometimes called the "Coal Act")[1], Respondent (petitioner below) is a "person aggrieved" by the orders issued by the Petitioners dated August 28 and September 30, 1942, which increased in the amount of 20¢ per ton minimum prices for bituminous coal payable by Respondent's members and which orders were issued in a proceeding to which Respondent was a party, so that Respondent may obtain a review of such orders in the Circuit Court of Appeals for the Second Circuit where Respondent resides and has its principal place of business.

Statement

Respondent recognizes that the question presented is one of public importance, especially if the Coal Act is extended by Congress without change in its present provisions beyond the expiration date, August 23, 1943.[2] Respondent also concedes that it may be desirable to have the question finally disposed of prior to a consideration of the petition for review upon the merits.

It is the position of the Respondent, however, that the determination of the question, as made in the court below, was in all respects correct and that there is no necessity for a further review of the question by this Court, since, as we shall show, the determination below appears to accord with the recent rulings of this Court in analogous situations arising under the review provisions of the Federal Communications Act of 1934.[3]

In the proceedings instituted by Petitioner Wheeler and his predecessor (designated General Docket No. 21),

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[1] 15 U. S. C., Sec. 836 (b); 50 Stat. 85.

[2] See Joint Resolution to extend the provisions of the Bituminous Coal Act of 1937 for a period of ninety days, Public Law 53—78th Cong., Ch. 97, First Sess., H. J. Res. 122, approved May 21, 1943.

[3] 47 U. S. C. Sec. 301, *et seq.*

which resulted in the issuance of the orders under review, a copy of the published notice of hearing in the proceeding was served upon Respondent's counsel. Thereupon, Respondent, as an interested party, duly appeared in the proceeding and became a party thereto without objection. In connection with its appearance, Respondent filed, as a part of the record, a complete list of Respondent's members consisting of 1,356 persons, firms and corporations engaged in commerce and industry in the State of New York and who purchase and consume substantial quantities (estimated at approximately 15,000,000 tons for the year 1942) of bituminous coal produced in Minimum Price Area 1, as defined in the Coal Act (R. 1 and R. 15).[4]

Respondent actively participated as a party in the proceedings before Petitioners. Its counsel cross-examined witnesses, filed motions, objections and exceptions, submitted written briefs and presented oral arguments before the Trial Examiner who heard the proceedings in General Docket No. 21 and before Petitioner Wheeler. The Trial Examiner and the Petitioners made numerous rulings which expressly referred to matters urged by Respondent's counsel (R. 3, 37).

Respondent's counsel urged before the Petitioners, among other things, that orders dated August 28 and September 30, 1942, made in such proceeding, increasing minimum prices, were not made in accordance with the provisions of the Coal Act; that the Petitioners exceeded the powers conferred by the Coal Act, and that the orders were made upon findings which were contrary to the evidence and which were not supported by substantial evidence

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[4] Besides Respondent, numerous other associations, representatives of consumers and producers of coal, appeared in the proceeding without objection, including, among others, Association of American Railroads; National Coal Association; United Mine Workers of America; American Coal Distributors Association; National Association of Hothouse Vegetable Growers of America; Ohio Hothouse Cooperative Association; Cleveland Vegetable Growers Cooperative Association; Toledo Hothouse Growers Association; Ashtabula Growers Association and Marion County Greenhouse Association (see Stenographic Minutes of hearing in General Docket No. 21, pages 5107-9).

(R. 3, 4, 6, 11, 12, 13 and 14). Respondent's objections and exceptions to findings and conclusions made by the Trial Examiner and by Petitioner Wheeler were overruled in large part.

Respondent also filed a petition addressed to Petitioner Ickes to review the order of Petitioner Wheeler and upon such review to stay the same. However, such petition was denied and the order of Petitioner Wheeler was affirmed by Petitioner Ickes (R. 14).

On October 27, 1942, Respondent, as petitioner, filed its petition in the Circuit Court of Appeals for the Second Circuit to review the orders of the Respondents Wheeler and Ickes dated, respectively, August 28 and September 30, 1942.[3]

Petitioners moved to dismiss the Respondent's petition for review of the orders increasing minimum prices on the ground that Respondent is not a "person aggrieved" by the orders within the meaning of Section 6(b) of the Coal Act and lacked standing to maintain a petition for review and that the court was without jurisdiction of the petition (R. 34, 35). After a full oral argument and the submission of printed briefs, the motion was denied by an order dated March 3, 1943 made by Swan, Augustus N. Hand and Frank, Circuit Judges (R. 60). The opinion of the court by Frank, C. J., was filed February 8, 1943 and is printed at R. 36 to 59.

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[3] Prior to the filing of the petition for review, by letter dated October 16, 1942, Respondent made inquiry of the office of the Consumers' Counsel whether that office "will undertake to obtain a judicial review of the said orders". By letter dated November 3, 1942, six days after the time within which Respondent was advised the petition for review should be filed, Luther Harr, Consumers' Counsel, replied, saying, among other things: "We did not reply to you sooner because in our judgment the period of sixty days fixed by the statute ran from the date of the Secretary's [Ickes'] order rather than from the date of the Director's order, so that we did not feel that a decision was necessary prior to November 29. We are giving careful consideration to your petition and are studying the question of intervention and possible participation in the court proceeding. We have not come to a definite conclusion on this question, but we shall keep in touch with you from time to time." The Consumers' Counsel did not intervene and did not take any proceedings to review the Petitioner's orders.

POINT I

The Respondent is an "aggrieved person" within the meaning of Section 6(b) of the Coal Act and therefore has a valid standing to maintain the petition for review and the Court below has jurisdiction of the petition for review.

It is conceded by Petitioners that the orders of August 28 and September 30, 1942, increasing minimum prices, are reviewable orders.

To make certain that Petitioners' orders would have the force of law, compliance with the provisions of Section 2(a) of the Act was required. That provision reads as follows:

> "* * * No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence shall be conclusive upon review thereof by any court of the United States."[6]

Within the foregoing provision Respondent was an "interested party" and, as such, it became a party to the proceeding in which the orders under review were issued.

The provisions of Section 6(b) of the Act pursuant to which the petition for review was filed read as follows:

> "(b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States

[6] 15 U. S. C. Sec. 829(a).

> Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."[7]

In the petition for review the Respondent alleged, among other things, that its members are consumers of bituminous coal and purchase and consume substantial quantities (estimated to be approximately 15,000,000 tons for the year 1942) of bituminous coal; that such coal has been and is being sold to Respondent's members at not less than minimum prices established by the Petitioners; that the orders dated August 28 and September 30, 1942 made by the Petitioners are prejudicial to the Respondent and its members, in that they require Respondent and its members to purchase and pay for bituminous coal produced in Minimum Price Area 1 (as defined in the Act) at increased minimum prices and at prices related to such increased prices which have not been determined according to law (R. 4 and 14).

The Coal Act expressly provides in Section 4II(e) that:

> "No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code * * *.

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[7] 15 U. S. C. Sec. 836(b).

"The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the code, *and such contract shall be invalid and unenforceable.*" (Italics supplied.)[8]

Thus it cannot be doubted that, as a party to the proceeding which resulted in the issuance of the orders sought to be reviewed, Respondent adequately established that Respondent and its members have suffered and will continue to suffer economic injury by such orders so that Respondent has a standing to present the question of the validity of the orders by appeal, that is, by petition for review in a Circuit Court of Appeals.

In analogous situations arising under the provisions of the Federal Communications Act of 1934[9] this Court appears to have settled the rule that a showing of economic injury by a party to a proceeding before an administrative agency which has issued an order causing such injury gives such party a standing to present the question of the public interest in the validity of such order by an appeal from (i. e., court review of) the order of the administrative agency.

Federal Communications Commission v. *Sanders Bros. Radio Station,* 309 U. S. 470;

Federal Communications Commission v. *National Broadcasting Company, Inc.* (KOA) *et al.,*— U. S.,—No. 585, October Term, 1942, decided May 17, 1943.

In the *National Broadcasting Company* case, *supra,* it was said in the opinion of this Court:

"SECOND. While the Commission did not urge before the court below, and did not advance as a reason for the grant of certiorari, that respondent was not entitled to appeal to the Court of Appeals, this matter

[8] 15 U. S. C. Sec. 833 (e).

[9] 47 U. S. C., Sec. 301, *et seq.*

was argued here and, as it raises a question of jurisdiction, we shall consider it.

"It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing. We think the Act does not preclude such an appeal. Section 402(b) (2) permits an appeal to the Court of Appeals of the District of Columbia by 'any * * * person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing' any application for modification of an existing station license. If, within the intent of the statute, the interests of KOA would be adversely affected, or if KOA would be aggrieved by granting the application of WHDH, then the statute grants KOA a right of appeal.

"In *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470, we dealt with a similar situation. There the question was whether a rival station, which would suffer economic injury by the grant of a license to another station, had standing to appeal under the terms of the Act. We held that it had. We pointed out that while a station license was not a property right, and while the Commission was not bound to give controlling weight to economic injury to an existing station consequent upon the issuance of a license to another station, yet economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission. Here KOA, while not alleging economic injury, does allege that its license ought not to be modified because such action would cause electrical interference which would be detrimental to the public interest.

"In view of the fact that §312(b) grants KOA the right to become a party to the proceedings, we think it plain that it is a party aggrieved, or a party whose interests will be adversely affected by the grant of WHDH's application, as, indeed the Commission seems to have thought when it first noticed WHDH's application for hearing. We, therefore, hold KOA was entitled to appeal from the Commission's action in excluding it from participation in the proceeding and from the order made by the Commission.

"The judgment is affirmed."

It is respectfully submitted that the decision below is fully in accord with the recent ruling of this Court on the precise question raised by Petitioners on this application and that there is, therefore, no necessity for the granting of the writ of certiorari to review the decision below.

CONCLUSION

For the reasons stated, therefore, it is respectfully requested that the petition for a writ of certiorari be denied.

June, 1943.

HORACE R. LAMB,
Attorney for Respondent,
Associated Industries of
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LE BOEUF & LAMB,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 61

HAROLD L. ICKES, Secretary of the Interior, and DAN H. WHEELER, Director of the Bituminous Coal Division of the Department of the Interior, Petitioners

v.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S CROSS-MOTION TO DISMISS THE WRIT OF CERTIORARI AND TO REMAND

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IN THE

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HAROLD L. ICKES, Secretary of the Interior, and DAN H. WHEELER, Director of the Bituminous Coal Division of the Department of the Interior, Petitioners

v.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S CROSS-MOTION TO DISMISS THE WRIT OF CERTIORARI AND TO REMAND

Respondent moves the Court to dismiss the writ of certiorari granted June 14, 1943 and to remand this cause to the Circuit Court of Appeals for the Second Circuit with directions to dismiss the petition herein without prejudice and without cost to either party, on the ground that this proceeding and the cause have become moot.

The motion is based upon the fact that the Bituminous Coal Act of 1937*, upon the provisions of which this cause is founded, expired August 24, 1943.

* Act of April 26, 1937, c. 127, 50 Stat. 72, 15 U. S. C., Sec. 828, *et seq.*, as extended April 11, 1941, 55 Stat. 134, 15 U. S. C., Supp. I, Sec. 849 and amendment of April 24, 1943, P. L. 40, 78th Cong., 1st sess., c. 68, H. J. Res. 113 and amendment of May 21, 1943, P. L. 53, 78th Cong., 1st sess., c. 97, H. J. Res. 122.

The Solicitor General has moved this Court to *reverse* the order of the Circuit Court of Appeals for the Second Circuit entered March 3, 1943 and to remand the cause with directions to *vacate* its order and dismiss the petition for the reason that the cause has become moot.

Respondent opposes those portions of the motion of the Solicitor General which request this Court to reverse the order of the Circuit Court of Appeals and to direct that Court to vacate its order entered March 3, 1943.

The order of the Circuit Court denied a motion of Petitioners Ickes and Wheeler (respondents below) for an order dismissing the petition of the Respondent in the Circuit Court of Appeals for alleged lack of status on the part of the Respondent to maintain its petition to review orders of the Petitioners Wheeler and Ickes dated, respectively, August 28 and September 30, 1942, which directed increases in minimum prices of bituminous coal.

Although this proceeding and this cause have become moot by the expiration of the Coal Act, the cause was not moot when the Circuit Court of Appeals entered its order sustaining Respondent's status as petitioner below and the order was, therefore, validly made. The order of the Circuit Court of Appeals did not (and does not now) constitute any restraint upon or interference with any rights of the Petitioners Ickes and Wheeler or either of them. Furthermore, no other judgment, decree or injunction has been entered in the court below, the continuance of which constitutes any restriction or interference with the freedom of action of the Petitioners Ickes and Wheeler. There is, therefore, no necessity for the reversal or the vacating of the order of the Circuit Court of Appeals. The Solicitor General has not stated any facts as a basis for those portions of the motion on behalf of Petitioners which request the reversal and vacating of the order of the Circuit Court of Appeals.

The disposition of this appellate proceeding and of the cause, now to be made by this Court, should not tend to prejudice or embarrass the Respondent. In dismissing this proceeding and remanding the cause nothing should now be done by this Court which may be construed as a determination upon the merits. It is unnecessary for this Court to determine whether the Respondent could maintain the proceeding as originally commenced. Justice requires that in disposing of this cause at this time by reason of the expiration of the statute under which the cause arose this Court should do nothing more than is necessary to terminate the litigation. Any direction now made by this Court should not, either directly or by implication, produce a result which is favorable to one party and unfavorable to the other. Moreover, there should be no award of costs to either party as against the other.

In the circumstances, it is respectfully submitted that there being no judgment, decree or order which now affects any of the rights of Petitioners Ickes and Wheeler, a proper disposition of the appellate proceeding which brought the cause here and of the entire cause will be accomplished by (1) dismissing the writ of certiorari and (2) remanding the cause to the Circuit Court of Appeals for the Second Circuit with directions to dismiss the petition in that court without prejudice and without costs.

It is respectfully submitted that the suggested procedure by Respondent is in accordance with the established practice.

O'Ryan v. *Mills Novelty Co.*, 292 U. S. 609;
Brownlow v. *Schwartz*, 261 U. S. 216;
Mills v. *Green*, 159 U. S. 651, 657.

Wherefore, Respondent respectfully requests that its cross-motion be granted, as prayed, and that the Petitioners' motion be denied.

September 19, 1943.

Respectfully submitted,

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No. 61. ICKES, SECRETARY OF THE INTERIOR, ET AL. *v.* ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC. Certiorari, 319 U. S. 739, to the Circuit Court of Appeals for the Second Circuit. October 18, 1943. *Per Curiam:* This is a proceeding brought by respondent pursuant to § 6 (b) of the Bituminous Coal Act of 1937, 50 Stat. 85, 15 U. S. C., § 836 (b), as amended, to review an order of the Bituminous Coal Commission prescribing minimum prices for Minimum Price Area No. 1. We granted certiorari June 14, 1943, to review an order of the Circuit Court of Appeals refusing to dismiss the proceeding for want of capacity of respondent to bring it. Both parties now suggest that the cause has become moot by reason of the expiration of the Bituminous Coal Act on August 24, 1943. They disagree as to the proper disposition to be made of the cause. The record does not disclose and we are not informed whether the order of the Commission, which by its terms became effective on October 1, 1942, remained in effect between that date and August 24, 1943, or to what extent rights arose and liabilities and obligations were incurred under the Commission's order during that period, which survive the expiration of the Act. Accordingly we vacate the order of the Circuit Court of Appeals and remand the cause to that court for such further proceedings as may be appropriate. *Solicitor General Fahy* and *Messrs. Warner W. Gardner* and *Arnold Levy* for petitioners. *Mr. Horace R. Lamb* for respondent. Reported below: 134 F. 2d 694.